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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. [redacted] 213

GRAIN MERCHANTS OF INDIANA, INC., ET AL.,
BANKRUPTS

Petitioners,

MARK L. FRANCE, TRUSTEE,

vs.

UNION BANK AND SAVINGS COMPANY,
BELLEVUE, OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR CERTIORARI.

Mark L. France, Trustee in Bankruptcy for Grain Merchants of Indiana, Inc., Bankrupt, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the entitled case on March 13, 1969.

OPINIONS BELOW.

The basic opinion and order involved in this application is that of Referee Robert K. Rodibaugh, issued on February 9, 1968 in Bankruptcy No. 7259, United States District Court for the Northern District of Indiana, Fort Wayne Division, ordering Union Bank and Savings Company, Bellevue, Ohio, to turn over to the Trustee in Bankruptcy the sum of Fifty-Two Thousand Forty-one and 49/100 Dollars ($52,441.49), said amount representing the proceeds of accounts receivable payable to Grain Merchants of Indiana, Inc. which arose after September 20, 1966 and which were preferentially transferred to Union Bank and Savings Company, Bellevue, Ohio. Said opinion and order is unreported.

Pursuant to Petition for Review by Union Bank and Savings Company, Bellevue, Ohio, the United States District Court for the Northern District of Indiana, Fort Wayne Division in a Memorandum of Decision and Order entered July 8, 1968, set aside the Referee in Bankruptcy's Turn Over Order and remanded the cause for a further determination and for further proceedings in accordance with the court's opinion and with law. The District Court's Memorandum of Opinion and Order is reported at 286 F. Supp. 596.

An appeal of the District Court's order was taken by the Trustee in Bankruptcy to the United States Court of Appeals for the Seventh Circuit which court, by opinion entered March 13, 1969, affirmed the order of the United States District Court. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 408 Federal 2d, 209.

All of the opinions referred to are reprinted in the Appendix hereto.

JURISDICTION.

This is a controversy arising in a proceeding involving conflicting claims to the proceeds of bankrupt's accounts receivable. Federal jurisdiction is conferred under Section 24(a) of the Bankruptcy Act, 11 USC ¶ 47a.

This court's jurisdiction is invoked under 28 U. S. Code, Paragraph 1254 (1).

QUESTIONS PRESENTED.

Whether the $52,441.49 representing proceeds of accounts receivable of Grain Merchants of Indiana, Inc. which came into existence after September 20, 1966 and which were seized and applied by the Union Bank and Savings Company, Bellevue, Ohio to obligations owed it by Grain Merchants of Indiana, Inc. were preferentially transferred under the provisions of Section 60 of the Bankruptcy Act.

Whether pursuant to the provisions of Sections 70(c) and 70 (e) of the Bankruptcy Act the position of the Trustee in Bankruptcy was superior to that of the Union Bank and Savings Company of Bellevue, Ohio which possessed an unperfected lien on accounts receivable which came into existence after September 20, 1966, for the reason that said accounts were transferred for an antecedent debt, all other elements of a preference under Section 60 of the Bankruptcy Act being present.

CONSTITUTIONAL PROVISION, PORTIONS OF THE BANKRUPTCY ACT AND PORTIONS OF THE UNIFORM COMMERCIAL CODE INVOLVED.

The Constitutional provisions, portions of the Bankruptcy Act and portions of the Uniform Commercial Code involved in the question presented are set forth in Appendix D, *infra,* pages 60A-63A.

STATEMENT OF THE CASE.

This case originated with the filing by a Trustee in Bankruptcy, on behalf of Grain Merchants of Indiana, Inc., Bankrupt, of a Petition for a Turn Over Order against Union Bank and Savings Company, Bellevue, Ohio, to turn over to the Trustee in Bankruptcy the sum of Fifty-two Thousand Four Hundred Forty-one and 49/100 Dollars ($52,441.49) which sum represented certain accounts receivable of the Bankrupt seized and collected by the Bank on the ground that said sum was preferentially transferred to said Bank under the provisions of Section 60 of the Bankruptcy Act.

On September 17, 1965 Bankrupt executed a Security Agreement with Union Bank and Savings Company, Bellevue, Ohio by the terms of which Union Bank was to have a security interest in all of Grain Merchants' assets including accounts receivable then belonging to Grain Marchants or thereafter coming into existence. This security interest was to secure loans to be made by Union Bank to Grain Merchants, from time to time, in amounts not to exceed sixty percent (60%) of the total of said accounts receivable which were not more than sixty (60) days old.

On the 20th day of each month, beginning October 20, 1965 through September 20, 1966, Grain Merchants submitted to Union Bank (a) a financial statement showing the purported financial condition of the corporation as of the end of the preceding month; (b) a list of all accounts receivable of the corporation, designating by name and amount the accounts which arose within thirty (30) days from the end of the preceding month, and all accounts which arose within 60 days prior to the end of the preceding month; and (c) promissory note made payable to the Union Bank dated the 20th day of the current month in an

amount approximating 60% of all of the outstanding accounts receivable as of the last day of the preceding month. The amounts of these promissory notes vary from $112,000.00 in January, 1966 downward to $100,000.00 in the months of August and September, 1966.

On September 30, 1966, 10 days after the execution of the most recent promissory note (September 20, 1966), Grain Merchants ceased doing business. On October 3, 1966, Grain Merchants signed a check delivering the entire balance of its checking account in the amount of $46,126.22 to the Bank, which sum included amounts collected from accounts receivable which arose after September 20, 1966. Thereafter, Union Bank seized all of the accounts receivable, including the accounts which arose after September 20, 1966 and collected enough of them to satisfy the Bankrupt's entire indebtedness to it. Included in the entire amount collected was the sum of $52,441.49 representing proceeds of accounts receivable which arose after September 20, 1966.

On October 27, 1966, Grain Merchants of Indiana, Inc. filed its Petition in Bankruptcy. Grain Merchants was insolvent, as that term is defined in the Bankruptcy Act, at all times after June 27, 1966. Union Bank had reasonable cause to believe that Grain Merchants was insolvent as of and after June 27, 1966.

The Referee in Bankruptcy held that the transfers of the accounts receivable to Union Bank took place at the time the individual accounts came into existence and that the transfers of accounts receivable which came into existence after September 20, 1966 were transfers on account of an antecedent debt, that debt being the $100,000.00 obligation evidenced by the promissory note dated September 20, 1966. The Referee also held that all of the other elements set forth in Section 60 (a) of the Bankruptcy Act were present and that the transfers of the accounts receivable which arose after September 20, 1966 were therefore void-

able. He ordered that the sum of $52,441.49 be turned over to the Trustee in Bankruptcy.

On review, the United States District Court for the Northern District of Indiana, Fort Wayne Division, held that the transfere to the Bank of the accounts receivable which came into existence after September 20, 1966 was not preferential and ruled that the transfer had in fact taken place long before the accounts came into existence, to-wit: September 17, 1965 when the Security Agreement was executed by the Bankrupt in favor of the Bank. (286 F. Supp. 596)

The United States Court of Appeals for the Seventh Circuit, by opinion dated March 13, 1969 affirmed. It held, in essence, that as of September 17, 1965, the date of the execution of the Security Agreement by the Bankrupt to the Bank, the Bank possessed a security interest in future accounts receivable that was so far perfected that the Trustee in Bankruptcy, despite the powers conferred upon him by the Bankruptcy Act, acquired no right in the accounts receivable claimed by him. (408 F. 2d 209)

REASONS FOR GRANTING WRIT OF CERTIORARI.

The issues presented in this case pose an important question of federal law which has not been, but should be, settled by the United States Supreme Court. (Rule 19)

The specfic question in this case has not previously been presented before this court.

For nearly a decade, since the adoption of the Uniform Commercial Code by a majority of the States, many authoritative commentators have discussed, from varying points of view, the intersection of the Uniform Commercial Code's provisions relating to after-acquired property with

the voiding power of a Trustee in Bankruptcy under Sections 60 and 70 of the Bankruptcy Act.[1]

Subsequent to the filing of its Appellant's Brief in the instant cause with the United States Court of Appeals for the Seventh Circuit, briefs of amicus curiae were filed by the Permanent Editorial Board for the Uniform Commercial Code and by National Commercial Finance Conference, Inc. The demonstrated interest of these two organizations, representative of the interests of the community of financing creditors as opposed to the interests of the community of merchant creditors represented by the Trustee in Bankruptcy, is further persuasive evidence of the importance of the question presented and the necessity that the issues be finally resolved.

The decision of the Seventh Circuit, although obliquely recognizing that there is a situational problem in the

1. See, *e.g.*, Gordon, Nahum, The Security Interest In Inventory under Article 9 of the Uniform Commercial Code and the Preference Problem, 62 Colum. L. Rev. 49 (1962) reprinted at Coogan, Hogan, Vagts, Secured Transactions Under The U. C. C. (1967) (hereafter "Coogan Et Al.") ch. 11; Kennedy, Frank, The Trustee In Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9, 14 Rutgers L. Rev. 518, 539-549 (1960) reprinted at 1 Coogan Et Al., ch. 10, §§ 10.03 [7]-[9] (1967); Riemer, Bernard, Bankrutcy-Preference Conflict Between § 9-108 of the Uniform Commercial Code and § 60(a) of the Bankruptcy Act, 70 CommL. L. J. 63 (1965); Viles, Robert, *The Uniform Commercial Code* v. *The Bankruptcy Act*, 55 Ky. L. Rev. 636 (1967); Coogan and Bok, The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture, 69 Yale L. J. 203 (1959) reprinted and revised Coogan Et Al., ch. 13; Friedman, Harold, The Bankruptcy Preference Challenge to After-Acquired Property Clauses Under the Code, 108 U. Pa. L. Rev. 194 (1959); Henson, Ray, "Proceeds" Under the Uniform Commercial Code, 65 Colum. L. Rev. 232 (1965); Kripke, "The Code and the Bankruptcy Act", 42 NYUL Review, 284 (1967); Hogan, "Games Lawyers Play With the Bankruptcy Preference Challenge to Accounts and Inventory Financing", 53 Cornell Law Review, 553 (1968); 3 Collier on Bankruptcy, ¶ 60.51A (6th ed. 1964); Gilmore, Security Interests in Personal Property chs. 8, 45 (1965); see also authorities collected at Viles, *supra*, nn 1-16.

application of the after acquired property concepts of the Uniform Commercial Code to the facts of the instant case, rendered a decision which apparently concluded that there was no problem at all.

Beginning November 20, 1965 and on the 20th day of each month until September 20, 1966 Grain Merchants executed promissory notes to the Bank secured by present and future accounts receivable pursuant to a Security Agreement dated September 17, 1965. Prior to Grain Merchants ceasing business, the most recent extension of any value by the Bank was the granting of another 30 day period in which to pay the $100,000.00 obligation, evidenced by a note dated September 20, 1966.

In this case, the Referee in Bankruptcy found, with respect to the accounts receivable which came into existence after September 20, 1966, all elements of a voidable preference to be present, to-wit: that Grain Merchants suffered a transfer of its property to the Union Bank on account of an antecedent debt, while Grain Merchants was insolvent, within four months of the filing of a Petition in Bankruptcy, giving the Bank a greater percentage of its debt than another creditor of the same class at a time when the Bank knew that Grain Merchants was insolvent.

The District Court, in its decision, disputed but two of the Referee's findings, to-wit: whether the accounts receivable which arose after September 20, 1966 were transferred within four months of the filing of a Petition in Bankruptcy by Grain Merchants or, as an adjunct, whether said accounts were transferred for an antecedent debt. Both the District Court and the Court of Appeals held that the accounts receivable which arose after September 20, 1966 had been transferred on September 17, 1965, the date of the execution of the Security Agreement, and therefore could not have been transferred for an antecedent debt.

These conclusions were reached only through the employment of conceptual artificialities designed to bring into congruence two incidents which occurred at different points in time, to-wit: the execution on September 17, 1965 of a Security Agreement and a transfer of an account receivable arising after September 20, 1966. The opinion of the District Court and the Court of Appeals held that the security interest of the Bank, created on September 17, 1965, was so far perfected that all subsequently arising accounts receivable were deemed transferred as of that date. The application of this artificial concept, that is, the relating forward of a security interest is nothing more than the application of the discredited doctrine of relation back. *United States* v. *Pioneer American Insurance Co.*, 374 U. S. 84, 92, Note 11. Further, the application of the concept is not only not invited by any language of Section 60 of the Bankruptcy Act but would appear, indeed, to defeat its purposes. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. *International Shoe Company* v. *Pinkus*, 278 U. S. 261, 265. Congress alone possesses the power to establish uniform laws on the subject of bankruptcy. *U. S. Constitution*, Art. I, Section 8(4).

Turning to the Uniform Commercial Code, it is clear that Article 9 does not contemplate the passage of any security interest in a given account, let alone a perfected one, until such time as the account actually arises or comes into existence. Section 9-204(3) does contemplate that a security interest may be granted in after acquired property, i.e., collateral acquired by the debtor after the making of the agreement. But Section 9-204(1) provides that the interest "attaches" to the collateral—that is, it arises or is created—*when the last of the following events has occurred:* first, the parties must agree that a security in-

terest attach; second, value must be given; and third, the debtor must have rights in the collateral. Section 9-204 (2)(d), expressly provides that a debtor has no rights in an account until it comes into existence. Furthermore, if the perfection step such as the filing of a financing statement has occurred previously, perfection takes place when the security interest attaches, and not at the earlier point of filing. Section 9-303(1).

The Bankruptcy Act places the Trustee in Bankruptcy in the position of a lien creditor over all the property of the bankrupt, whether or not coming into possession or control of the court.

Section 70(e)(1) provides that a transfer made by a debtor adjudged bankrupt which is voidable for any reason shall be null and void as against the Trustee of such debtor. Section 70(e)(2) obligates the Trsutee to avoid such voidable transfer for the benefit of the bankrupt estate.

The opinion of the Court of Appeals admits that the lien of the Union Bank was not fully perfected as of the date of the execution of the Security Agreement by the debtor on September 17, 1965 as to accounts receivable not yet in existence. Footnote 4 of the opinion states: "The Bank's security interest in the accounts receivable was fully perfected when it attached, and it attached when the Bank had rights in the collateral, which was when the accounts receivable came into existence." That attachment represented a transfer, and as to those accounts receivable which arose after September 20, 1966, the date of the most recent extension of value to the debtor, such transfers were obviously, in point of time, for an antecedent debt. That being obviously so, and all other elements of Section 60 of the Bankruptcy Act being present, the transfer was "null and void as against the Trustee of such debtor."

The Court of Appeals phrases this situation in its opinion thusly (page 213):

> "Thus we are presented with a situation where as soon as an account receivable comes into existence and is sought to be attached by a lien creditor, it has already become subject to a perfected security interest —here that of the Bank. The very occurrence which gives rise to full perfection of the security interest prevents the subsequent lien creditor from obtaining a priority as to the property. *Although the Code does not explicitly resolve this problem, we are persuaded by virtue of Section 9-301(1)(d), taken in conjunction with Section 9-204(3), that a secured creditor who has duly filed a financing statement covering after acquired collateral is entitled to priority over a subsquent lien creditor seeking to levy on the same property.*" (Emphasis added)

It is repeated, however, that before the Bank's security interest can become fully perfected it must attach. The fact of attachment is a transfer. The Trustee in Bankruptcy need not seek to levy on such transfer. Such transfer is null and void as to him.

There is no evidence in the record suggesting that either Grain Merchants or the Union Bank consciously considered the accounts receivable as a res nor is there any evidence of a conscious practice of substituting a new account when it came into existence for an old account as it was paid. Had such been the intention of the parties, words of understanding to that effect could have easily been placed into the Security Agreement upon which Union Bank relies.

If it was the intention of the drafters of Section 60 of the Bankruptcy Act and its Amendments to cause transfers of accounts receivable to relate back in time to the date of the signing of a blanket Security Agreement, such intention could and should have been indicated by the use of simple language. The Referee in Bankuptcy took the position that it was not the function of the court to place such

a surreal interpretation upon the express language and intent of Section 60 of the Bankruptcy Act for the sole purpose of negating the rights of a Trustee in Bankruptcy.

The decision of the Court of Appeals likewise creates a possible conflict with the rule announced by this court in *United States* v. *Pioneer American Insurance Company,* 374 U. S. 84 (1963) and *United States* v. *New Britain,* 347 U. S. 84, which cases held that although choate State-created liens take priority over later federal tax liens, it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected so as to defeat a later-arising or later-filed federal tax lien. Those cases further hold that the federal rule is that liens are: "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *New Britain,* id 347 U. S. at 84.

CONCLUSION.

Emphatic assertions in the opinion of the Court of Appeals below to the contrary, there does exist a conflict between the provisions of the Uniform Commercial Code and Sections 60 and 70 of the Bankruptcy Act which should be resolved by the Supreme Court. Because the question dealt with is one of great importance to the financial and mercantile communities of the country and because the question has not heretofore been considered nor resolved by the Supreme Court, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Indiana Bank Building,
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APPENDIX A.

UNITED STATES DISTRICT COURT

Northern District of Indiana,

Fort Wayne Division.

In the Matter of GRAIN MERCHANTS OF INDIANA, INC., GRAIN TRANSIT, INC., and STEINMAN, INC. *Bankrupts,* MARK L. FRANCE, *Trustee,* *vs.* UNION BANK AND SAVINGS COMPANY, BELLEVUE, OHIO, *Respondent.*	As Consolidated in Bankruptcy No. 7259. Amended Findings of Fact and Conclusions of Law.

The bankrupts, all Indiana corporations, were adjudicated on October 27, 1966, after the filing of a voluntary petition by each. Mark L. France duly qualified as Trustee for each of said corporations and moved for consolidation.

Grain Merchants of Indiana, Inc., engaged in the buying and selling of grain and feed ingredients. It terminated business on September 30, 1966.

Grain Transit, Inc., a contract trucking company that hauled, principally, the grain and feed ingredients purchased by Grain Merchants, also terminated its business on September 30, 1966.

Steinman, Inc., stopped doing business on September 1, 1965. Two judgments entered against this corporation in the United States District Court for the Western District

of Pennsylvania, coupled with the insolvency of its insurance carrier, rendered it hopelessly insolvent. Thereafter, its functions were taken over by Grain Merchants of Indiana, Inc.

On March 7, 1967, the Trustee in Bankruptcy, on behalf of Grain Merchants of Indiana, Inc., filed his petition for a turn over order against the Union Bank and Savings Company of Bellevue, Ohio. Said Petition alleged that sums of $98,049.95 and $37,727.01, representing the proceeds of accounts receivable generated by Grain Merchants during the months of August and September of 1966 as assigned by the bankrupt to the respondent Bank, and a check for $46,995.22, dated October 3, 1966, also given by the bankrupt to the bank, were all preferential transfers in violation of Section 60 of the Bankruptcy Act.

The Bank contends that the security agreement entered into with the bankrupt on September 17, 1965 gave it a security interest in all "after arising" accounts receivable, and that transfer of the accounts which came into being during August and September of 1966 must be deemed to have occurred on September 17, 1965 and thus not within the four months preceding bankruptcy. In addition, the Bank contends that the bankrupt's check for $46,995.22 must be treated as a valid set-off which it was entitled to under Section 68 of the Act, and not a preferential transfer under Section 60.

The Court, having examined the stipulations of the parties and heard the evidence, now finds:

1. On September 17, 1965 Grain Merchants of Indiana, Inc., executed two security agreements with the Union Bank and Savings Company, Bellevue, Ohio as the secured party, by the terms of which said corporation pledged all of its assets as collateral security for loans to be granted by the Bank to the corporation. One of the security agree-

ments granted a security interest in the corporation's inventory and the other, a security interest in all accounts receivable then existing or thereafter received by or belonging to the corporation. Financing statements were timely and appropriately filed. Grain Merchants of Indiana, Inc., was a successor corporation to Steinman, Inc., which had, in March of 1965, executed similar security agreements to the Bank in connection with loan transactions.

By the terms of the security agreements executed September 17, 1965 the corporation was entitled to borrow up to 60% of the net outstanding amount of qualified accounts receivable and up to 60% of the net security value of all inventory.

2. During the years 1965, 1966 and 1967, Simon Woodard was the duly appointed and acting President of Union Bank and Savings Company, Bellevue, Ohio, and during 1965 and 1966, Orville G. Steinman was the duly appointed and acting President of Grain Merchants of Indiana, Inc., Grain Transit, Inc., and Steinman, Inc., all Indiana corporations.

3. Grain Merchants of Indiana, Inc., commenced operation in September, 1965, as a successor to Steinman, Inc., performing the identical functions theretofore performed by Steinman, Inc. At the end of the year 1965, Steinman, Inc., had ceased active operation and Grain Merchants of Indiana, Inc., had assumed full operation of all of the former activities of Steinman, Inc.

4. The first loan by the Union Bank to Grain Merchants of Indiana, Inc. after the execution of the security agreements was in the amount of $15,000.00, evidenced by a promissory note executed November 9, 1965.

5. Commencing with the month of October, 1965, and through the month of September, 1966, Orville G. Steinman as President of Grain Merchants of Indiana, Inc., prepared

and submitted to the Union Bank and Savings Company the following documents on or before the 20th day of each month:

(1) A financial statement showing the purported financial condition of the corporation as of the end of the preceding month;

(2) A list af all accounts receivable of the corporation, designating by name and amount the accounts which arose within thirty days from the end of the preceding month, within sixty days from the end of the preceding month, and all accounts which arose more than sixty days prior to the end of the preceding month; and

(3) A promissory note made payable to the Union Bank and Savings Company, executed by Orville G. Steinman on behalf of Grain Merchants of Indiana, Inc., dated the 20th day of the current month, in an amount approximating 60% of all of the outstanding accounts receivable as of the last day of the preceding month.

6. During the year 1966 the amounts of the respective promissory notes executed by Grain Merchants of Indiana, Inc., in favor of Union Bank and Savings Company were as follows:

January	$112,000.00
February	$112,000.00
March	$112,000.00
April	$110,000.00
May	$110,000.00
June	$106,850.00
July	$105,000.00
August	$100,000.00

On or about September 20, 1966 an executed promissory note was mailed by Grain Merchants of Indiana, Inc., to

Union Bank and Savings Company in the amount of $111,-100.00. (Said Bank, without securing the agreement of Grain Merchants of Indiana, Inc., unilaterally treated said $111,100.00 note as a $110,000.00 note on its records and cancelled the August 20, 1966 note in the amount of $100,-000.00.)

7. That original advances of money by the Bank to the bankrupt, Grain Merchants of Indiana, Inc., reached a peak of $112,000.00 in January of 1966, and thereafter no additional funds were advanced.

8. During the year 1965, the amount which the Union Bank and Savings Company could legally loan to any corporation was limited to $125,000.00, which said amount was increased to $135,000.00 in 1966.

9. On December 10, 1965, Grain Merchants of Indiana, Inc., executed a promissory note in the amount of $30,-000.00, payable on demand, to the Union Bank and Savings Company specifically secured by warehouse receipts representing 35,000 bushels of corn. On December 27, 1965 Grain Merchants of Indiana, Inc., executed a promissory note to the Union Bank and Savings Company in the amount of $20,000.00, payable on demand, secured by warehouse receipts representing 25,000 bushels of corn. All of said warehouse receipts were issued by Orville G. Steinman as warehouseman and endorsed in blank by Orville G. Steinman as President of Grain Merchants of Indiana, Inc. Said notes were never renewed.

For the months of January through August, 1966, total amounts owing by Grain Merchants of Indiana, Inc. to Union Bank and Savings Company were as follows:

January	$162,000.00
February	$162,000.00
March	$162,000.00
April	$160,000.00
May	$160,000.00

June	$156,850.00
July	$155,000.00
August	$150,000.00

10. On September 30, 1966 Grain Merchants of Indiana, Inc., and Grain Transit, Inc., ceased doing business. On October 3, 1966, Orville G. Steinman, as President of Grain Merchants of Indiana, Inc., signed a check in the account of Grain Merchants of Indiana, Inc., payable to Union Bank and Savings Company, in the amount of $46,995.22. Prior to signing said check, Grain Merchants of Indiana, Inc., had on deposit in its checking account at the Union Bank and Savings Company as of the morning of October 3, 1966 the sum of $18,979.21, against which there had been issued checks totalling the sum of $21,623.72 to creditors of said corporation.

On October 3, 1966, Orville G. Steinman deposited to said account checks in the total sum of $28,197.73, which said sum was comprised of checks representing accounts receivable to Grain Merchants of Indiana, Inc., by name and amounts as follows:

Agway, Inc.	$1,365.46
S. E. Nighton Co.	2,281.25
Albert Buehrle Co.	1,144.50
Allied Mills, Inc.	1,140.80
Pioneer Feed Service	2,432.99
Dad's Dog Food, Inc.	7,705.90
Central Farm Supply, Inc.	210.00
Jansons Feed Service	966.99
Thomas Mack & Son	1,255.10
Agway, Inc.	1,372.44
West Feed Store	1,260.00
Central Soya, Marion, Ohio	2,403.68
Ohio Farms Grain and Supply	1,944.00
Harry S. Lindey & Son	1,399.21
Wooster Feed Manufacturing	1,316.40

All of said accounts receivable came in existence after August 20, 1966. $13,575.53 of said accounts came into existence after September 20, 1966.

11. On October 3, 1966 Union Bank and Savings Company applied the sum of $46,995.22 against the promissory note dated September 20, 1966 in the face amount of $111,100.00 which it had treated as a $100,000.00 note. Said sum so applied was subsequently reduced to $46,126.22 by reason of a returned check in the amount of $869.00.

12. On October 3, 1966 Union Bank and Savings Company seized all of the accounts receivable of Grain Merchants of Indiana, Inc., which were in existence as of September 30, 1966 and advised all of said named accounts of said fact and demanded payment. Said accounts receivable are clearly defined by name, amount and age as set forth on Exhibit F attached to the Pre-Trial Order in this cause. Of the accounts which came into existence after August 20, 1966, $28,197.73 thereof was included in the checks deposited by Orville G. Steinman on October 3, 1966 and likewise included within the $46,995.22 turned over to the Union Bank and Savings Company on said date.

Of the accounts receivable which came into existence after August 20, 1966 the Union Bank and Savings Company has collected and applied to the various indebtednesses of Grain Merchants of Indiana, Inc. the total sum of $98,381.02. (See Trustee's Exhibit No. 33) This sum includes the $28,197.73 deposit made on October 3, 1966. Said sum has been applied as follows (See Trustee's Exhibit No. 33):

$60,947.92	to the September 20 (Aug. 20), 1966 promissory note
$15,114.30	to the December 10, 1965 $30,000.00 promissory note
$17,202.20	to the December 27, 1965 $20,000.00 promissory note

(A balance of $5,116.52 collected from accounts which came into existence during the month of September, 1966, owed by P. J. Oesterling & Sons, has been placed in escrow by the Union Bank.)

13. Grain Merchants of Indiana, Inc. filed its Petition in Bankruptcy on October 27, 1966, thereby subjecting any transfer made by it after June 27, 1966 to scrutiny as to whether or not such transfer was preferential.

14. Of the accounts receivable which came into existence between August 1, 1966 and August 20, 1966, the Union Bank and Savings Company has collected the sum of $11,725.08 and has applied said sum as follows:

$11,564.40	to the $100,000.00 September 20 (Aug. 20) 1966 promissory note
$ 160.68	to the December 27, 1965 $20,000.00 promissory note

15. Of the July accounts receivable, $7,909.73 of the accounts collected were applied against the $100,000.00 note. $1,616.94 of said July accounts were applied against the December 10, 1965 $30,000.00 note, and $2,674.88 of said accounts were applied against the December 27, 1965 $20,000.00 note.

16. Of the June accounts receivable which came into existence after June 27, 1966, $293.25 of the accounts collected were applied either to the $30,000.00 or the $20,000.00 note and $1,208.48 was applied to the $100,000.00 note.

17. From the accounts receivable which came into existence after September 20, 1966 and which were collected by the Union Bank and Savings Company, the proceeds of said amounts collected were applied as follows:

$35,565.05	to the September 20 (Aug. 20) 1966 promissory note, of which said sum $13,575.53 was included in the checks deposited by Orville G. Steinman on October 3, 1966
$ 7,810.66	to the December 10, 1965 $30,000.00 promissory note
$ 3,949.26	to the December 27, 1965 $20,000.00 promissory note

(All as per Trustee's Exhibit No. 33.)

18. It was the intent and effect of the security agreement executed September 17, 1965 that all accounts receivable of Grain Merchants of Indiana, Inc. be purportedly transferred as security for the $100,000.00 loan immediately upon the coming into existence of each respective account.

19. The Debtor's Petition of Grain Merchants of Indiana, Inc., filed October 27, 1966 discloses debts owed to general creditors in the amount of $124,330.02, in addition to amounts owed Union Bank and Savings Company, Bellevue, Ohio. Financial statements of said corporation for the months of June, July and August of 1966 reflect accounts payable to general creditors in excess of $100,000.00 at all times. The great bulk of debts of unsecured creditors are due grain companies for 1966 purchases of grain and feed ingredients.

20. The financial statements submitted by Grain Merchants of Indiana, Inc., to the Union Bank and Savings Company at thirty-day intervals commencing with the thirty-day period ending on October 31, 1965, reflected the following cash balances:

October 31, 1965	$ 210.23	
November 30, 1965	3,062.96	
December 31, 1965	716.65	
January 31, 1966	(15,046.22	overdrawn)
February 28, 1966	157.31	
March 31, 1966	869.81	
April 30, 1966	(13,187.94	overdrawn)
May 31, 1966	(11,561.19	overdrawn)
June 30, 1966	(10,726.72	overdrawn)
July 31, 1966	(19,387.94	overdrawn)
August 31, 1966	(8,242.77	overdrawn)

21. That after September 20, 1966 and within four months of the filing of a voluntary petition in bankruptcy, Grain Merchants of Indiana, Inc. made certain transfers to the Bank on account of antecedent debts, by either assignment of accounts receivable which came into existence after September 20, 1966 or by payment of proceeds from accounts receivable which came into existence after September 20, 1966.

22. That at all times after the 27th day of June, 1966, Grain Merchants of Indiana, Inc. was insolvent, in that the aggregate of its property at a fair valuation was insufficient in amount to pay its debts.

23. That at the time of the aforesaid, Respondent had reasonable cause to believe that Grain Merchants of Indiana, Inc. was insolvent.

24. That the effect of said transfers was to enable the Respondent to obtain a greater percentage of its debt than some other creditor of the same class.

OPINION.

The Uniform Commercial Code, which became effective in Indiana on July 1, 1964 has now been adopted by all of the United States excepting Louisiana. The District of Columbia and Virgin Islands have, also, adopted it.

As was to be expected, it is not completely uniform, but it is fairly much so; in general, the Code is a real step forward in the commercial world. If a business has a transaction or dispute that crosses state lines, it's much simpler to find the law of the other state covering the matter. Although it may be a little early to judge matters, it appears that the Code is a much easier statute to work with in Indiana than what we had before the Code.

It is regrettable that there are any areas of conflict between the Code and the Bankruptcy Act, but the facts require that we now examine a collision course on which the Act and the Code appear to be travelling.

Did the Bank perfect its rights to such a degree that it has priority over the Trustee in Bankruptcy with respect to bankrupt's accounts receivable, or the proceeds thereof, as generated within four months of bankruptcy?

The bankrupt's office and the place its records were kept being in New Haven, Indiana, the rights of the parties, insofar as the Uniform Commercial Code is concerned, depend upon the law of Indiana. (Sec. 19-9-103 Indiana Uniform Commercial Code.—All Indiana Uniform Commercial Code citations are from Burns Ind. Statutes Ann., Vol. 5, Part 2)

Concerning the Bank's security interest in the bankrupt's future or after-acquired property (accounts receivable), Section 19-9-204(1) of the Code provides:

> "A security interest cannot attach until there is an agreement . . . that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

Section 19-9-204(2) goes on to provide:

> "For purposes of this section the debtor has no rights . . . (d) in an account until it comes into existence."

While Section 19-9-303(1) provides as follows:

> "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections 19-9-302, 19-9-304, 19-9-305 and 19-9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

The above (Sections 19-9-204(2) and 19-9-303(1) go along well with Section 60a(2) of the Bankruptcy Act, the first sentence of which is as follows:

> "For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."

The troublesome sections of the Code, as the same are applied to the facts of the case at hand, are:

> "19-9-108. When after-acquired collateral not security for antecedent debt. —Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given."

"19-9-20[illegible] Use or disposition of collateral without accounting permissible. —A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods), or to collect or compromise accounts, contract rights or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee."

We are told that Sec. 19-9-108 renders Sec. 60a(1) of the Bankruptcy Act impotent, in that there is an automatic attachment of a floating lien on accounts receivable or on fluctuating inventory, regardless of the relative dates of the loans and the time receivables come into existence or inventory comes into being.

Section 60a(1) of the Act provides:

"A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

The Bankruptcy Act does not define antecedent debt. There have been cases, of course, interpreting Sec. 60a which have given "antecedent" the ordinary, "Webster's Dictionary" meaning. The Code, then (Sec. 19-9-108) would attempt to re-define this term or, at least, tell us what is not an "antecedent debt".

Also, we have always thought that an account receivable did not exist, that is the debtor had no rights in the account, until it had been earned. This apparently is no longer true under the Code, if ". . . after acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt. . ." Insofar as the scriveners of the Code are concerned, a new fiction of law has been given birth.

Since 1925, when Mr. Justice Brandeis delivered the opinion of the Court in *Benedict* v. *Ratner* (268 U. C. 353, 45 S. Ct. 566, 69 L. Ed. 991, 6 ABR (NS) 9), if a debtor retained unfettered dominion and control over the security involved, giving him the opportunity to use and commingle the proceeds resulting from disposition or liquidation of the collateral (accounts receivable or chattels), the security transaction would usually be found void as to the trustee. Now we are told that the policing features required by *Ratner* have become passe and that we must view the Bankruptcy Act as supplementing the provisions of the Code. (Sec. 19-1-103)

However, notwithstanding Sec. 19-1-103, it is hard to believe that the Code's authors actually thought that in a conflict between the Code and the Bankruptcy Act, that the Act would yield to the Code. Just the opposite would obviously be the correct law, and it has been so held. In *International Shoe Co.* v. *Pinkus* (1928), 278 U. S. 261 (265), the Court said: "States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." (see also: *In re Mills,* 76 F. Supp. 764; *City of New Orleans* v. *Harrell,* 134 F. 2d 399; and *Hammond* v. *Lyon Realty,* 59 F. 2d 592)

I am sure that even the most enthusiastic proponents of the Code have had some doubt as to the reconciliation of

Section 19-9-108 with the provisions of the Bankruptcy Act's Section 60a. Much thought has obviously gone into the various theories of how to make Section 19-9-108 palatable on judicial test.

The "unitary theory" or "substituted collateral theory", or a mixture of both, are usually advanced by those seeking to reconcile the Code with the Act. The unitary theory teaches that we should no longer think of an inventory as a list of various components or accounts receivable as a series of individual accounts. We must, rather, think of inventory or receivables as units which may fluctuate and change as inventory is sold or accounts collected, with a security interest attaching to "inventory" or "receivables", as the case may be, notwithstanding a change in the make-up of either. Inventory or receivables are thus treated as a floating mass. Disciples of this philosophy urge us to compare inventory, for example, to a river, the water of which is constantly changing although you still see the same river.

It must be noted at this point that the unitary theory runs into trouble with section 19-9-204(1), which provides that a security interest can not attach until the debtor has rights in the collateral, and that the debtor has no rights in an account until it comes into existence.

Concerning the substituted collateral theory, this approach seems to be that since the original capital advanced is being used over and over again, to provide new inventory and/or accounts receivable, a security interest should attach to the new inventory and accounts which have been substituted for the old inventory or accounts which have been sold or collected. Here we have an equitable consideration, based on the premise that the original funds advanced continued throughout as the means of producing the flow of collateral, and that a floating lien should be

deemed to be taken for new value relating back to the time when the security agreement was executed by the parties.

Both of the above theories assume that the debtor acquired his rights in such collateral either in the ordinary course of business or under a contract of purchase made pursuant to the security agreement, within a reasonable time after new value is given.

Collier on Bankruptcy (Vol. 3, at pages 1050.16 and 1050.17, Section 60.51A) has examined this problem and concluded as follows:

> "If Sec. 9-108 is given full effect by the Bankruptcy Courts there will be no preferential transfer because the security interest will not be given for an antecedent debt. The problem is that the section is effective only if it is within the area in which states can legislate. Section 9-108 attempts to affect the status of an interest already perfected and this may well be solely within the province of the Bankruptcy Act.
>
> "Essentially, Sec. 60 refers to state law for the definition or solution of only one item and that is when a transfer is deemed perfected. The Bankruptcy Act itself contains no definition of 'perfection' nor does it state when perfection occurs. In the situation under discussion, there is no concern with perfection. That occurs when the security interest attaches, i.e., when the debtor acquired the after-acquired property.
>
> "On the other hand, the Bankruptcy Act, in Sec. 60 uses the words 'antecedent debt' and does not refer to state law for definition. Throughout the previous discussion of this element of a preferential transfer, there is a listing of the cases and opinion determining this element to be a pre-existing debt as distinguished from new consideration. It does not seem likely that state law can impose a new definition upon the Bankruptcy Act, nor does it seem likely that the bankruptcy courts will accept the Code's classification of an antecedent debt as new value in this instance. This fictional definition attempted by the Code stems from the con-

cept developed in Secs. 9-204 and 9-303 of when a security interest, attaches. It was foreseen that the later attaching date would create a conflict with Sec. 60 of the Bankruptcy Act because a lengthy time span would be normal between the giving of value and the attaching of the security interest. To say that at the time of attaching new value was given, as Sec. 9-108 attempts to do, is *pure fiction* which bankruptcy courts probably will not tolerate.' (Emphasis mine.)

Collier's analysis of what the "courts probably will not tolerate" in order to reconcile Section 19-9-108 with Section 60a of the Bankruptcy Act has not proved to be true.

In *Rosenberg v. Rudnick* (1967), D. C. Mass., 262 F. Supp. 635, the learned District Judge appears to have adopted the unitary theory. "In applying Sec. 60, however, inventory subjected to a security interest should be viewed as a single entity and not as a mere conglomeration of individual tems, each subject to a separate lien."

And, *In the Matter of Portland Newspaper Publishing Co., Inc.* (Aug. 22, 1967 DC Ore.) Judge Solomon stated that he agreed with *Rudnick*, and seems to have adopted an approach embracing both the unitary and substituted collateral theories.

At this point, I am in full agreement with Professor Lawrence P. King of the New York University Law School, who, in his article "*Some Thoughts on Article 9 of the Uniform Commercial Code and the Bankruptcy Act*" published in the July 1967 issue of the "Commercial Law Journal", said:

"I believe that both Section 60 of the Bankruptcy Act and Article 9 of the Code have to be revised. I do believe also that it would be perfectly fruitless to revise either or both of them unless some group can make some policy determinations respecting the basic questions concerning the rights of all parties involved. I hope I am not being too naive in believing that this

is a possible avenue of approach, that it is feasible, and that people can look at these matters from a purely objective viewpoint. In the long run this is precisely what will have to be done in order for the whole law of secured transactions and bankruptcy to reach the desired clarity and serve the purposes for which both were intended."

While I am generally quite sympathetic with the purpose of the Code and the opportunity it gives small businesses to actually use accounts receivable financing as capital financing, I dislike seeing the power of the Courts used to solve a knotty problem that belongs to Congress under Article I, Sec. 8(4) of the United States Constitution.

If Section 19-9-108 of the Code is given full effect, there will, of course, be no preferential transfer under Section 60 of the Bankruptcy Act, no security interest having been given for an antecedent debt. However, have we not then indulged in a major philosophical change from the Bankruptcy Act?

In its effort to equalize distribution of assets to creditors, the Bankruptcy Act surrounds a bankrupt with a number of arbitrary barriers designed to prevent one or more creditors from taking advantage over others less alert. Sec. 60 has in mind more than just secret liens: it causes the bankrupt's operations in the four months before bankruptcy to be carefully scrutinized by the Court. The rug is rolled back for four months, so to speak, and creditors who have received advantages over the less alert are forced to disgorge preferences they have received.

Other sections of the Bankruptcy Act may be completely unhinged if said Sec. 19-9-108 of the Code is potent. One that comes to mind is Sec. 64 of the Act. I assume that in a situation where a "floating lien" secured creditor has gobbled up all the inventory and accounts receivable, leaving the debtor penniless, that the workman whose energy

created the inventory and receivables will have no priority under Section 64a(2).

It would seem that Congress should at least be given an opportunity to look at such application of Sec. 19-9-108, and decide what modifications, if any, should be made to Sec. 60 and other sections of the Bankruptcy Act. It does not seem equitable that laborers and material suppliers should be placed behind security interests given for antecedent debts.

On the other hand, about the only money available to a small business may be what it can borrow on its accounts receivable and inventory. Small business has increasing demands for capital.

A thorough study of the whole situation appears to be in order, but, in the meantime, I do not think that Sec. 60 of the Act should be watered down.

Accordingly, I am of the opinion that the September 20, 1966 promissory note executed by Grain Merchants of Indiana, Inc., in the amount $111,100.00 in favor of the Respondent is valid to the extent of $100,000.00, and that accounts receivable assigned to said Respondent on or before September 20, 1966 may be credited to said note. Said note replaced a previous $100,000.00 note, which was marked paid. This is a usual banking practice and supplies a consideration for the new note.

I am, also, of the opinion that Respondent is entitled to the proceeds of the sale of the corn as well as proceeds of any accounts receivable generated on or before September 20, 1966 and applied to the December 10, 1965 note for $30,000.00 and the December 27, 1965 note for $20,000.00 (both secured by warehouse receipts on the corn) to the extent that if said applied accounts receivable proceeds were applied instead to the $111,100.00 note of September 20, 1966 payment would not exceed $100,000.00.

I am, further, of the opinion that bank deposits accepted in the ordinary course of business before October 3, 1966, less deposits for proceeds of accounts receivable coming into existence after September 20, 1966 may be set-off to the Bank under Sec. 68 of the Bankruptcy Act. The $28,197.73 deposit made on October 3, 1966, which the Respondent used to "build up" a larger set-off, may be retained only to the extent it reflects proceeds of accounts receivable coming into existence on or before September 20, 1966. Accordingly, $13,575.53 of said deposit must be returned to the Trustee. (4 Collier on Bankruptcy, pp. 782-787, Sec. 68.16)

An assignment of new accounts as security within the four months period to replace accounts assigned prior thereto, and which had been collected, constitutes a preferential transfer. (3 Collier, 60.21, p. 865. *Wolfe* v. *Bank of Anderson* (C. C. A. 4th Cir.), 38 ABR 387, 238 Fed. 343. *In re Lambert* v. *Braceland Co.* (DC Pa.), 13 ABR (NS) 292, 29 F. 2d 758)

I am grateful for the excellent briefs and other assistance given to me by counsel.

CONCLUSIONS OF LAW.

1. That this Court has jurisdiction of the subject matter and the parties, under the provisions of Sections 23(b) and 60(b) of the Bankruptcy Act.

2. That the Trustee has sustained the burden of proof that certain transfers of either accounts receivable which came into existence after September 20, 1966 or the proceeds thereof by the bankrupt, Grain Merchants of Indiana, Inc., to Union Bank and Savings Company of Bellevue, Ohio were preferences as defined in Section 60(a) and (b) of the Bankruptcy Act.

3. That the Trustee is entitled to a judgment against the Union Bank and Savings Company of Bellevue, Ohio for an amount equal to the proceeds collected by said Bank on the bankrupt's accounts receivable which came into existence after September 20, 1966, plus interest from the dates said payments were received.

4. That upon payment to the Trustee by the said Bank of the judgment, it may file its claim herein for the total amount paid to the Trustee, as a general unsecured claim, pursuant to Section 57(n) of the Bankruptcy Act.

Counsel, having settled an order based upon these Amended Findings and Conclusions, the Court now separately re-enters said Order.

Entered at South Bend, Indiana, on the 9th day of February, 1968.

/s/ ROBERT K. RODIBURGH,
Referee in Bankruptcy.

cc: ATTY. PAUL W. PHILIPS,
309 Standard Building,
Fort Wayne, Indiana,
Counsel for Respondent.

ATTY. GEORGE E. FRUECHTENICHT,
Indiana Bank Building,
Fort Wayne, Indiana,
Counsel for Trustee.

UNITED STATES DISTRICT COURT.

* * (Caption—7259) * *

The Court, having previously entered its Amended Findings of Fact and Conclusions of Law on February 9, 1968 with respect to Trustee's Petition for Turn Over Order against Union Bank and Savings Company, Bellevue, Ohio; and now, in accordance with said findings of fact and conclusions of law, it is

Ordered, Adjudged and Decreed that Union Bank and Savings Company, Bellevue, Ohio, forthwith turn over and surrender to the Trustee herein the sum of Fifty-Two Thousand Four Hundred Forty-one and 49/100 ($52,441.49); said amount representing the proceeds of accounts receivable which arose after September 20, 1966 and which were collected and applied by Union Bank and Savings Company, together with interest thereon at the rate of six percent (6%) as follows:

(a) On $13,575.53, from October 3, 1966 to date of payment.

(b) On $20,706.52, from October 20, 1966 to date of payment.

(c) On $1,288.00, from November 21, 1966 to date of payment.

(d) On $7,494.30, from December 20, 1966 to date of payment.

(e) On $437.25, from January 25, 1967 to date of payment.

(f) On $621.95, from March 2, 1967 to date of payment.

(g) On $8,322.94, from April 19, 1967 to date of payment.

Judgment entered accordingly, at South Bend, Indiana, on this 9th day of February, 1968.

/s/ ROBERT K. RODIBURGH,
Referee in Bankruptcy.

cc: PAUL W. PHILIPS,
Attorney for Respondent.

GEORGE E. FRUECHTENICHT,
Attorney for Trustee.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—7259) * *

MEMORANDUM OF DECISION AND ORDER.

This matter is before the court on a petition by the respondent, Union Bank and Savings Company, Bellevue, Ohio, for review of an order entered February 9, 1968 by the referee in bankruptcy requiring the bank to turn over to the trustee in bankruptcy, Mark L. France, the sum of $52,441.49. The referee in bankruptcy held that this amount represented preferences which were voidable by the trustee under the provisions of Section 60 of the Bankruptcy Act, 11 U. S. C. § 96. This court has jurisdiction under 28 U. S. C. § 1334. This petition for review of an order of a referee in bankruptcy is authorized by Section 39 of the Bankruptcy Act, 11 U. S. C. § 67. This court concludes that the order of the referee in bankruptcy entered February 9, 1968 must be set aside, and the matter must be remanded to the referee for further determinations.

The funds which the referee in bankruptcy has ordered the Union Bank and Savings Company, Bellevue, Ohio, (hereinafter referred to as "Union Bank") to turn over to the trustee of the bankrupt, Grain Merchants of Indiana, Inc., (hereinafter "Grain Merchants") represent collections upon accounts receivable of Grain Merchants which were created after September 20, 1966. These accounts receivable were transferred to Union Bank as security for a loan made by Union Bank to Grain Merchants on September 20, 1966 pursuant to a security agreement made between

Union Bank and Grain Merchants in September of 1965. The bank's security interest in these accounts receivable was valid and perfected under Indiana law. However, the referee in bankruptcy held that the accounts receivable created after September 20, 1966 were transferred to the Union Bank when the individual accounts were created, and were therefore transferred "for or on account of an antecedent debt" within the meaning of Section 60 of the Bankruptcy Act, 11 U. S. C. § 96. Having found that the trustee had established the other elements of a voidable preference, the referee voided the transfer of these accounts and ordered the collections on account of these transfers turnd over to the trustee. The question for determination in this petition for review of the referee's order is the correctness of the referee's holding that these accounts were transferred to the Union Bank, for purposes of Section 60 of the Bankruptcy Act, at the time when individual accounts receivable were created.

On September 17, 1965, Grain Merchants executed a security agreement with the Union Bank. By the terms of this security agreement, Union Bank was to have a security interest in all accounts receivable then belonging to Grain Merchants or thereafter received by or belonging to Grain Merchants. This security interest was to secure loans to be made by the Union Bank to Grain Merchants in amounts which were limited by the terms of the security agreement. At the same time, Grain Merchants also executed in favor of Union Bank a second security agreement which granted the bank a security interest in inventory. However, only the security agreement concerning accounts receivable is involved in this action. Financing statements relating to these security agreements were timely and appropriately filed.

On December 10, 1965, Grain Merchants executed a promissory note in the amount of $30,000.00, payable on demand,

to the Union Bank. This note was specifically secured by warehouse receipts representing 35,000 bushels of corn. On December 27, 1965, Grain Merchants executed a second promissory note to the Union Bank, this one in the amount of $20,000.00. This note was secured by warehouse receipts representing 25,000 bushels of corn.

In addition to the two notes described above, Grain Merchants executed a series of promissory notes in favor of Union Bank which were secured in part by accounts receivable under the security agreement which had been executed September 17, 1965. Beginning no later than January of 1966, Grain Merchants executed a new promissory note in favor of Union Bank on the 20th day of each month. The note which had been executed the previous month was then canceled. Grain Merchants executed such a note on September 20, 1966 in the amount of $100,000.00 in favor of Union Bank. (The face amount of the note executed by Grain Merchants on September 20 was actually $111,100.00, but the bank unilaterally treated it as a note for $100,000.00, and it may be considered as a note in the latter amount for purposes of this action.) Upon receipt of the note executed September 20, 1966, the Union Bank canceled a note executed August 20, 1966 in the same amount. The referee held that cancellation of the August 20 note constituted consideration for the September 20 note, and the trustee has not questioned this holding. Thus the Union Bank may be considered as having extended credit to Grain Merchants in the amount of $100,000.00 on September 20, 1966.

On September 30, 1966, Grain Merchants ceased doing business. On October 3, 1966, the Union Bank took certain steps to apply assets then in the hands of Grain Merchants toward payment of the existing indebtedness of Grain Merchants to Union Bank. As of October 3, the balance on the two notes executed in December of 1965, together

with interest then owing, totaled $51,659.52. In addition, the balance on the note executed September 20, 1966, including accrued interest, totaled $100,596.03.

Grain Merchants had on deposit in the Union Bank on October 3 the sum of $18,979.21. That day the bank paid four checks drawn against the account of Grain Merchants totaling $181.72. In addition, one check in the amount of $869.00 which Grain Merchants had deposited to its account was returned to the bank unpaid, and Union Bank accordingly reduced Grain Merchant's balance by $869.00. The net amount of Grain Merchants balance at Union Bank on October 3 was $17,928.49. Union Bank set this amount off against the indebtedness of Grain Merchants. This offset is permitted under Section 68 of the Bankruptcy Act, 11 U. S. C. § 108, and the trustee has not challenged it.

The Union Bank also seized corn which was covered by warehouse receipts issued to Union Bank to secure the two notes executed in December of 1965. The Union Bank sold this corn for $13,802.15. The trustee does not question Union Bank's right to proceeds from the sale of this corn.

In addition, on October 3 Grain Merchants deposited with the Union Bank the sum of $28,197.73, which represented collections on accounts receivable. The referee did not recognize this as a completed deposit, and did not permit the Union Bank to treat this amount as an offset under Section 68 of the Bankruptcy Act, 11 U. S. C. § 108. The Union Bank has not questioned this holding of the referee. The referee permitted the Union Bank to retain $14,622.20 out of the amount which Grain Merchants attempted to deposit on October 3. This amount represented collections on accounts receivable which arose on or before September 20, 1966, the last date on which Union Bank extended credit to Grain Merchants. The referee held that because these accounts receivable arose on or before September 20, the

bank's lien on these accounts receivable did not attach on account of an antecedent debt, and the bank's lien was therefore not a preference as that term is defined in Section 60 of the Bankruptcy Act, 11 U. S. C. § 96.

However, out of the funds which Grain Merchants turned over to the Union Bank on October 3, the other $13,575.53 represented collections on accounts receivable which came into existence after September 20, 1966. The referee has ordered that these funds be returned to the trustee.

In addition to the collections from accounts receivable which Grain Merchants turned over to the Union Bank on October 3, Grain Merchants also turned over to Union Bank all its then outstanding, uncollected accounts receivable. The Union Bank then proceeded to collect these accounts and apply the proceeds against the remaining indebtedness of Grain Merchants. These collections totaled $99,443.70. Of this amount, $60,577.74 represented collections on accounts receivable which came into existence on or before September 20, 1966. The referee permitted Union Bank to retain these funds. The remaining $38,865.96 represented collections on accounts receivable which arose after September 20, 1966. The referee has ordered that these funds be turned over to the trustee.

For clarity, these financial transactions should be summarized. Grain Merchants' total indebtedness to Union Bank was $152,255.55, of which $100,596.03 was created on September 20, 1966, and the remainder was created in December of 1965. Against this amount, Union Bank has collected from all sources the sum of $159,372.07. Of these collections, $7,116.52 represents an excess over the total indebtedness of Grain Merchants to Union Bank, and this amount is now in escrow. From sources other than accounts receivable, Union Bank collected $31,730.64. From accounts receivable coming into existence on or before September

20, 1966, Union Bank collected $75,1 94. From accounts receivable which came into existence after September 20, 1966, Union Bank collected $52,441.49. This last sum is the amount which the referee has ordered Union Bank to turn over to the trustee.

Grain Merchants filed its petition in bankruptcy on October 27, 1966. It was insolvent, as that term is defined in the Bankruptcy Act, at all times after June 27, 1966.

The referee held that the transfers of accounts receivable to Union Bank took place at the time that the individual accounts came into existence and that the transfers of accounts receivable which came into existence after September 20, 1966 were therefore transfers on account of an antecedent debt. The referee also held that the effect of the transfers of accounts receivable was to enable the Union Bank to obtain a greater percentage of its debt than other creditors of the same class. The referee therefore concluded that the transfers of accounts receivable which came into existence after September 20, 1966 constituted preferences as that term is defined in Section 60(a) of the Bankruptcy Act, 11 U. S. C. § 96(a). The referee also found that at the time of transfer, the Union Bank had reasonable cause to believe that Grain Merchants was insolvent. Accordingly, the referee held that the preferences were voidable under Section 60(b) of the Bankruptcy Act, 11 U. S. C. § 96(b), and ordered the $52,441.49 collected as a result of the preferences to be turned over to the trustee.

The referee in bankruptcy permitted Union Bank to retain $75,199.94 in collections from accounts receivable created on or before September 20, 1966. The referee permitted the Union Bank to apply all of this amount against the indebtedness of $100,596.03 which was created on September 20, 1966. Because the collections from ac-

counts receivable which the referee permitted the Union Bank to retain did not exceed the amount of the September 20 indebtedness, the referee did not consider whether, under the agreements between the bank and Grain Merchants, the accounts receivable were also intended to secure the indebtedness created in December of 1965.

The security agreement which Grain Merchants executed in favor of the Union Bank in September of 1965 purported, in accordance with Indiana state law, to give Union Bank a security interest in all of Grain Merchants' uncollected accounts receivable then in existence or thereafter arising. Such a security agreement is specifically authorized in Burns Ind. Stat. § 19-9-204(3), which provides that, with exceptions not relevant here, ". . . a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement." This provision from the Uniform Commercial Code validates what is sometimes called a "floating lien." Burns Ind. Stat. § 19-9-205 provides that a security interest may be valid notwithstanding power in the debtor to collect and apply the proceeds of accounts receivable without accounting to the secured party. Thus, the Uniform Commercial Code as adopted in Indiana provides for financing arrangements whereby a debtor may transfer a security interest in a stock of accounts receivable, but retain possession of the accounts, collect them, and create new ones. The security interest "floats" over the accounts receivable in existence at any given moment. The security agreement between Grain Merchants and Union Bank in the instant case was just such a "floating" financing arrangement.

The Union Bank timely and appropriately filed a financing statement covering the security agreement between Grain Merchants and the bank. This financing statement fully complied with the provisions of the Indiana Uniform Commercial Code and was filed well in advance of the

creation of the particular accounts receivable which are involved in this case. The bank contends that under the Indiana Uniform Commercial Code, other creditors of Grain Merchants became subordinated to the bank's security interest in all Grain Merchants' accounts receivable, present and future, at the time Grain Merchants filed its financing statement. Therefore, contends the bank, the accounts receivable should all be considered to have been transferred at the time the financing statement was filed, well in advance of the bank's extension of credit to Grain Merchants. If, as the bank contends, the time of transfer was the date of filing the financing statement, then the transfers of accounts receivable were not transfers "for or on account of an antecedent debt" and were therefore not preferences as defined in Section 60(a) of the Bankruptcy Act, 11 U. S. C. § 96(a).

The bank further contends that even if each account receivable is considered to have been transferred at the time it came into existence, the transfers nevertheless are not "for or on account of an antecedent debt" because of another provision of the Indiana Uniform Commercial Code, Burns Ind. Stat. § 19-9-108. This section provides in relevant part:

> "*When after-acquired collateral not security for antecedent debt.*—Where a secured party makes an advance . . . or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral . . . in the ordinary course of his business. . . ."

This section of the Indiana Uniform Commercial Code would, if applied, govern the disposition of this case. However, the referee held that this Indiana statute conflicts

with Section 60 of the Bankruptcy Act and therefore cannot be given effect. The referee found that the accounts receivable created after September 20, 1966 were transferred "on account of an antecedent debt." Having found that the trustee had established the other elements of a voidable preference, the referee voided the transfers and ordered the collections on account of these transfers turned over to the trustee.

This case raises a difficult problem of construction and application of Section 60(a) of the Bankruptcy Act, 11 U. S. C. § 96(a). This court holds that the transfer to the Union Bank of accounts receivable pursuant to the security agreement executed between Grain Merchants and the Union Bank in September of 1965 should be considered to have taken place when Union Bank filed its financing statement. This conclusion is based upon a careful consideration of the language and purposes of the Bankruptcy Act and, in particular, of Section 60 of that Act. Because of this conclusion as to the proper construction of Section 60 of the Bankruptcy Act, it has been unnecessary to consider the effect of Burns Ind. Stat. § 19-9-108 upon the construction of Section 60.

The time when personal property, such as an account receivable, is deemed to have been transferred to a creditor, for the purposes of Section 60, is governed by Section 60(a)(2), 11 U. S. C. § 96(a)(2):

> "For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. . . ."

When a transfer becomes perfected to the extent required by Section 60(a)(2) is a matter of state law. *Matthews* v. *James Talcott, Inc.*, 345 F. 2d 374 (7th Cir. 1965). *See McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, 65 S. Ct. 405 (1945).

The provision for time of transfer in Section 60(a)(2) of the Bankruptcy Act looks to the time when, under the applicable state law, subsequent lien creditors are precluded from establishing a claim superior to that of the transferee. Under Burns Ind. Stat. § 19-9-204(3), the Union Bank could and did acquire a security interest in Grain Merchants' stock of accounts receivable valid against "lien creditors" at the time Union Bank filed its financing statement as required by the Indiana Uniform Commercial Code. Only if Union Bank's security interest is regarded as a separate interest in individual accounts may it be said that the transfer of those accounts occurred at the moment individual accounts came into existence. Regarding Union Bank's security interest in Grain Merchants' stock of accounts receivable as a security interest in individual accounts is a highly unrealistic view of the transaction, a view which is not in accord with business practice and which is not required by the language or purposes of Section 60 of the Bankruptcy Act.

The general purpose of the Bankruptcy Act was succinctly stated in H. R. Rep. No. 1293, 81st Cong., 1st Sess. (1949), 2 U. S. Code Cong. Service, 81st Cong., 2nd Sess. (1950), p. 1985, at 1986:

> "Traditionally, it is the primary office of the Bankruptcy Act to protect creditors, both secured and unsecured; to marshal the bankrupt's assets, and to distribute them among his creditors equitably and ratably, in accordance with their respective rights and interests.
>
> "It follows from these broad general principles, as

well as from the basic provisions of the Bankruptcy Act itself, that—

> "(A) A trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor, with all such a creditor's remedies (Bankruptcy Act, sec. 70); and
>
> "(B) Except as may be necessary to avoid preferences or fraudulent transfers, he takes the bankrupt's assets subject to all valid liens and encumbrances thereon, as conferred by applicable State law (Bankruptcy Act, secs. 57(e) and (h), sec. 67(b), and sec. 70)."

If the Congressional purpose of an equitable and ratable distribution of assets among creditors of the bankrupt is to be achieved, an alert creditor should not, shortly before bankruptcy, be permitted to deny to the trustee, and thus deny to the general creditors of the bankrupt, assets which under state law the general creditors might reasonably have expected to apply in satisfaction of their claims. In order to avoid such an inequitable result, Congress provided in Section 60 of the Bankruptcy Act that certain events were to be treated as "preferences," and under certain circumstances these preferences were made voidable at the instance of the trustee in bankruptcy. As originally enacted, Section 60 failed to recognize the possibility that a transfer might be completed between a debtor and a creditor long before other creditors of the bankrupt were made aware of it. *See* 3 Collier, *Bankruptcy* § 60.06, n. 7 (14th ed. 1967). Beginning in 1903, Congress attempted through a series of amendments to deal with the problem of liens against the property of a bankrupt which were not recorded as required by state law until shortly before bankruptcy. In 1903 Congress added to the definition of a "preference" the following language:

> ". . . Where the preference consists in a transfer, such period of four months shall not expire until four

months after the date of recording or registering of the transfer, if by law such recording or registering is required." *See* 3 Collier, *Bankruptcy, supra* at § 60.05, n. 14.

Additional amendments to Section 60 in 1910 and in 1926 continued this same effort to protect general creditors against unrecorded liens.

A series of Supreme Court decisions soon showed that Congress had not achieved the desired objective of protecting general creditors against "secret" liens. In *Sexton* v. *Kessler & Co.*, 225 U. S. 90, 32 S. Ct. 657 (1912), a debtor, later a bankrupt, segregated certain securities and held them as security for the benefit of one of its creditors. Within four months of bankruptcy, the "secured" creditor took possession of the securities. The Supreme Court held that the transfer was not a preference because the transferee creditor had an "equitable" right to possession more than four months before bankruptcy. In *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 36 S. Ct. 50 (1915), *Carey* v. *Donohue*, 240 U. S. 430, 36 S. Ct. 386 (1916), and *Martin* v. *Commercial National Bank*, 245 U. S. 513, 38 S. Ct. 176 (1918), the Court considered various kinds of transfers of property between a debtor and a creditor more than four months before bankruptcy, but which were recorded during the four-month period. In all these cases, the Supreme Court held that the transfers were not preferences as defined in Section 60 of the Bankruptcy Act.

Recognizing that it had failed in its efforts to protect general creditors against unrecorded liens, Congress completely rewrote Section 60 of the Bankruptcy Act in 1938. The approach of the Congress to the problem of "secret" liens was to postpone the effectiveness of a transfer until

> "it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so

transferred superior to the rights of the transferee therein. . . .'' *See* 3 Collier, *Bankruptcy, supra,* § 60.06, n. 13.

The clear effect of this provision was to postpone the effectiveness of a transfer as against general creditors until valid notice was given under state law. Unfortunately, the 1938 version of Section 60 resulted unintentionally in undermining the status of certain kinds of secured credit, particularly the assignment of accounts receivable. *See Corn Exchange National Bank & Trust Co. v. Klauder,* 318 U. S. 434, 63 S. Ct. 679 (1943); *In re Vardaman Shoe Co.,* 52 F. Supp. 562 (E. D. Mo. 1943). Congress was not satisfied with the effect which its 1938 version of Section 60 had upon secured credit, so in 1950 Congress once again amended Section 60. This amendment put Section 60 in its present form. The House Report which accompanied the 1950 amendment states:

> ". . . . In 1938 the Bankruptcy Act was amended to obviate the effect of [the *Sexton, Bailey, Carey,* and *Martin* cases described above], which were regarded with disfavor by the great majority. But in so doing, the authors of the amendment went further than was necessary, and it brought about results which they did not anticipate. The amendment placed the trustee in the position of an artificial bona fide purchaser, and, by so doing, unintentionally invalidated many types of liens acquired in good faith and for value, in normal and accepted business and financial relationships. . . .
>
> "The resultant confusion has cast grave doubt upon the validity of normal business security. . . . '' H. R. Rep. No. 1293, *supra,* 2 U. S. Code Cong. Service at 1986, 1987.

It is therefore clear that in adopting Section 60 as it now reads, Congress intended not only to invalidate "secret" liens, Congress also intended to give effect to legitimate forms of secured financing created in accordance with

state law. The House Report clearly stated this latter purpose:

> "... . The present [1938] language of the act tends to impede and choke the flow of credit, principally to small-business men, and the object of the bill is to free its channels." H. R. Rep. No. 1293, *supra*, 2 U. S. Code Cong. Service at 1985.

It would be exceedingly ironic if language in a statute which was intended to facilitate secured financing were construed in a manner which discouraged such financing. Nothing in the language or purposes of Section 60 compels such a construction.

The facts of this case are plainly not within the evil which Congress was seeking to prevent in Section 60. The creditors of Grain Merchants had the notice of Union Bank's lien against accounts receivable required by the Indiana Uniform Commercial Code well before the four-month period and before the Union Bank last extended credit to Grain Merchants. The legitimate and reasonable expectations of the general creditors of Grain Merchants are in no way upset or frustrated by giving full effect to the security agreement which Grain Merchants executed with the Union Bank. On the other hand, if this security agreement is held to conflict with Section 60 of the Bankruptcy Act, then the trustee will be able to claim for the benefit of the general creditors assets which the general creditors never reasonably expected and could not expect to have available to satisfy their claims. Obviously, such a result would discourage the flow of secured credit and would therefore be contrary to an expressed aim of the Congress.

Regarding the accounts receivable which were created after September 20, 1966 as part of a stock of accounts receivable transferred when Union Bank filed its financing statement is not, as the trustee contends, a "fiction." From

a business standpoint, the most accurate view of the transaction is to regard the stock of accounts receivable together as an entity which was given as security for a new loan. The individual components of that entity may have changed, but that did not alter the essential character of the security given. A stock of accounts receivable is an essential tool of modern business. It is an asset used to generate income, just as plants and equipment are assets used to generate income. In modern finance, it is far more realistic to view the entire stock of accounts receivable together as a single asset subject to a single security interest than to view individual accounts as separate assets subject to separate security interests. *In re Portland Newspaper Publishing Co.*, 271 F. Supp. 395 (D. Ore. 1967). *See Rosenberg* v. *Rudnick*, 262 F. Supp. 635 (D. Mass. 1967).

The court therefore concludes that if Section 60 is to be interpreted in a realistic manner and in the manner most consistent with the Congressional purpose in enacting it, the transfers of accounts receivable which came into existence after September 20, 1966, and which were transferred to the Union Bank pursuant to its security agreement with Grain Merchants executed in September of 1965, must be considered as part of a transfer of a stock of accounts receivable occurring when Union Bank filed its financing statement and, therefore, not as individual transfers on account of an antecedent debt.

The construction of Section 60 which the court adopts is a matter of federal law. This construction is consistent with the law of Indiana as expressed in Burns Ind. Stat. § 19-9-108. Whether the concept of "transfer . . . on account of an antecedent debt" in Section 60 may be subject to interpretation or change by the states is a question which this court therefore need not consider.

For the reasons above stated, the court holds that the transfer to Union Bank of accounts receivable created after

September 20, 1966 was not a preference, at least to the extent that the collections from accounts receivable may be applied in payment of the September 20, 1966 note. This note totaled $100,596.03. The referee permitted the Union Bank to retain $75,199.94 in collections from accounts receivable. The Union Bank may therefore retain at least an additional $25,396.09.

The remaining collections on accounts receivable which arose after September 20, 1966 totaled $27,045.40. Of this amount, the bank concedes that it must return $7,116.52, the amount by which its total collections from all sources exceeded its claims against the bankrupt. The bank seeks to apply the remainder, $19,928.88, in satisfaction of the two notes which Grain Merchants executed in favor of the bank in December of 1965. If, as the bank contends, the security agreement covering accounts receivable which was executed on September 17, 1965 provided additional security for the two loans made in December of 1965, then the bank may apply the proceeds from collections on accounts receivable in payment of these loans. However, if either or both of these loans were not secured by accounts receivable, the bank's appropriation of accounts receivable was a preference to the extent that proceeds were applied in payment of such loan or loans.

The order of the referee in bankruptcy directing the Union Bank to turn over to the trustee in bankruptcy of Grain Merchants the sum of $52,441.49, plus interest as provided in the referee's order, is set aside. This cause is remanded to the referee for a determination as to whether the notes executed by the bankrupt to the Union Bank in December of 1965 were secured by accounts receivable under the security agreement executed September 17, 1965 and for further proceedings in accordance with this opinion and with law.

In view of this disposition of Union Bank's petition for review, it is unnecessary to consider the bank's other assignments of error.

Entered this 8th day of July, 1968.

Jesse S. Eschbach,
United States District Judge.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1968 — January Session, 1969

No. 17120

GRAIN MERCHANTS OF INDIANA, INC., et al., Bankrupts, MARK L. FRANCE, Trustee,

Appellant,

vs.

UNION BANK AND SAVINGS COMPANY, Bellevue, Ohio,

Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

March 13, 1969

Before CASTLE, *Chief Judge,* and FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In September 1965, Grain Merchants of Indiana, Inc. commenced its business of buying and selling grain and feed ingredients. On the 17th of that month, Grain Merchants entered into a security agreement with Union Bank and Savings Company of Bellevue, Ohio. Pursuant to Section 9-302 of the Uniform Commercial Code (5 Burns Ind. Stats. Ann., Title 19, § 19-9-302),[1]

1. For convenience sake, later references to the Uniform Commercial Code will not contain the Indiana statutory citations.

appropriate financial statements were filed in the office of the Indiana Secretary of State and of the Allen County, Indiana, Recorder that same month. The Security agreement granted the Bank a security interest in all of Grain Merchants' accounts receivable "now or hereafter received by or belonging to Borrower [Grain Merchants] for goods sold by it or for services rendered by it." This security interest was to secure loans to be made by the Bank to Grain Merchants, but the loans were not to exceed 60 per cent of the total of said accounts receivable which were not more than 60 days old.

During the October 1965—September 1966 period that the Bank was lending working capital to Grain Merchants, on or about the 20th day of each month Grain Merchants submitted to the Bank a financial statement as of the end of the previous month, a list of all accounts receivable, and a promissory note in the sum of 60 per cent of the outstanding accounts receivable as of the last day of the previous month. As the proceeds of accounts receivable were collected by Grain Merchants, they were deposited in an account with the Bank, and, prior to October 3, 1966, Grain Merchants was permitted to draw on this account in order to satisfy its day-to-day expenses of doing business.

For the purposes of this case, three promissory notes executed by Grain Merchants in the Bank's favor are pertinent. Two notes in the amounts of $30,000 and $20,000 were executed in December 1965, and a $100,000 note was executed on September 20, 1966. Upon receipt of this last note, the Bank cancelled a note for a like amount which had been executed by Grain Merchants the previous month. All parties concede that the cancellation of this August note on September 20 constituted the last formal extension of new value to Grain Merchants.

On September 30, 1966, Grain Merchants, which had become insolvent in June of that year, ceased doing business. On October 27, 1966, it filed its petition in bankruptcy.

On October 3, the Bank took various steps to apply assets in the hands of Grain Merchants toward payment of the $152,255.55 balance, including interest, owed on these three notes. Out of an October 3 deposit by Grain Merchants with the Bank, $13,575.53 appropriated by the Bank represented collections on accounts receivable which came into existence after September 20, 1966. On October 3 Grain Merchants turned over to the Bank its then outstanding uncollected accounts receivable. The Bank then proceeded to collect these accounts, and $38,865.96 of these collections were on accounts receivable which arose after September 20, 1966.

In Grain Merchants' bankruptcy proceedings, the referee ordered the Bank to turn over to the bankruptcy trustee the aforesaid amounts totaling $52,441.49, less $7,116.52, which represents an excess over the total indebtedness to the Bank and is in escrow. Therefore, the present proceeding involves $45,324.97.

The bankruptcy referee held that the transfer of accounts receivable to the Bank took place at the time that the individual accounts came into existence and that therefore the transfer of accounts receivable post September 20, 1966, were transfers on account of an antecedent debt. He concluded that the transfers of such accounts receivable constituted preferences within Section 60a of the Bankruptcy Act (11 U. S. C. § 96(a)). He also concluded that at the time of the transfers of such accounts the Bank had reasonable cause to believe that Grain Merchants was insolvent, so that the preferences were voidable under Section 60b of the Bankruptcy Act (11 U. S. C. § 96(b)). The

district court set aside the referee's turnover order, holding that the transfers to the Bank of these accounts receivable did not constitute a preference. The facts are set out in more detail in Judge Eschbach's thorough opinion, reported at 286 F. Supp. 597 (N. D. Ind. 1968).[2]

The Transfer Occurred a Year Before Bankruptcy.

The Bankruptcy Act permits a bankruptcy trustee to avoid a "preference," as defined in the Act, if the creditor had reasonable cause to believe that the debtor was insolvent at the time of the transfer (Section 60b; 11 U. S. C. § 96(b)). The referee found that the Bank had such cause, and the district court did not dispute this finding. The bankruptcy referee held that there was a "preference" on the ground that there had been a transfer of property of Grain Merchants to the Bank within four months before the filing of the bankruptcy petition, on account of an antecedent debt (Section 60a(1); 11 U. S. C. § 96(a)(1)).[3] In

2. Battle lines were drawn and issue joined by commentators and practitioners long before the Bank ever conceived of making loans to Grain Merchants on the strength of accounts receivable whenever acquired. The result we reach today has been thoroughly anticipated by some and repudiated by others over the course of the last decade at least. It would serve little purpose to attempt to annotate the pros and cons of each argument advanced by the parties in the present case. The articles prior to *In the Matter of Portland Newspaper Publishing Co., Inc.*, 271 F. Supp. 395 (D. Ore. 1967), appeal docketed *sub nom. Williams* v. *Rose City Development Co.*, No. 22507-A (9th Cir. May, 1968), are collected in Viles, *"The Uniform Commercial Code* v. *The Bankruptcy Act,"* 55 Ky. L. Rev. 636 (1967). Useful recent studies are cited at appropriate points herein.

3. Section 60a(1) defines a preference as follows:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

its contrary holding that there had been no such transfer, the district court relied on Section 60a(2) of the Bankruptcy Act providing that a transfer of property is deemed to have been made "when it became *so far perfected* that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee" (11 U. S. C. § 96(a)(2); emphasis supplied). This is, in the first instance, a question of priorities between creditors rather than a question of complete perfection in the abstract. The district court concluded that Grain Merchants' transfer to the Bank of the security interest in the post September 20, 1966, accounts receivable was "so far perfected" when the financing statements were filed in September 1965 that it must be deemed to have been made then by virtue of Section 60a (2). Therefore, there was no transfer within four months of filing the bankruptcy petition and consequently no preference within Section 60a(1) of the Act.

The agreement between Grain Merchants and the Bank was executed on September 17, 1965, and granted the Bank "a security interest" in all of Grain Merchants' accounts receivable "now or hereafter received." The parties thus intended to accomplish a transfer to the Bank of a security interest in Grain Merchants' present and future accounts receivable. In conformity with Section 9-302 of the Commercial Code, appropriate financing statements were duly filed later that month.

Reference to state law is necessary to determine whether a secured creditor has "so far perfected" his lien as to cut off the rights of a subsequent lien creditor under Section 60a(2) of the Bankruptcy Act. *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, 370; *Matthews* v. *James Talcott, Inc.*, 345 F. 2d 374 (7th Cir. 1965), certiorari denied, 382 U. S. 837. Since the Uniform Commercial Code was in

effect in Indiana at the time of this transaction, this question must be answered by reference thereto. Section 9-204(3) of the Commercial Code validates a floating lien by providing that "a security agreement may [as here] provide that collateral *whenever acquired,* shall secure all obligations covered by the security agreement" (emphasis supplied). This Section obviously permits a security agreement to create a lien in after-acquired accounts receivable.

Under Section 9-301(1)(d) of the Code, the Bank's unperfected security interest in the future accounts receivable would be subordinate to the rights of "a person [lien creditor] who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and *before it is perfected*" (emphasis supplied). A lien creditor is defined in Section 9-301(3) as "a creditor [including a bankruptcy trustee] who has acquired a lien on the property involved by attachment, levy, or the like * * *." Thus we are presented with a situation where as soon as an account receivable comes into existence and is sought to be attached by a lien creditor, it has already become subject to a perfected security interest—here that of the Bank.[4] The very occurrence which gives rise to the full perfection of the security interest prevents the subsequent lien creditor from obtaining a priority as to the property. Although the Code does not explicitly resolve this problem, we are persuaded by virtue of Section 9-301(1)(d), taken in conjunction with Section 9-204(3), that a secured creditor who has duly filed a financing statement covering after-acquired collateral is entitled to priority over a subsequent lien creditor seeking

4. The Bank's security interest in the accounts receivable was fully perfected when it attached, and it attached when the Bank had rights in the collateral, which was when the accounts receivable came into existence. See Sections 9-303 (1), 9-204 (1) and 9-204 (2) (d) of the Commercial Code.

to levy on the same property.[5] Thus by promptly filing the financing statements required by the Code, the Bank's security interest in the future accounts receivable then became superior to subsequent liens obtainable by "proceedings on a simple contract" as prescribed in Section 60a(2) of the Bankruptcy Act.

Our conclusion that this transfer occurred in September 1965 is consistent with the purposes of the Bankruptcy Act. A bankruptcy trustee is meant to take the assets subject to all liens conferred by state law, except where necessary to avoid preferences or fraudulent transfers. 2 U. S. Code Cong. Service, 81st Cong., 2d Sess. 1986 (1950). To implement the first exception, Section 60 of the Bankruptcy Act permits a trustee in bankruptcy to treat "preferences" as voidable. However, under the preference Section as it existed prior to 1938, a series of cases sustained transfers of security interests attacked as preferences so long as the agreement bound the debtor prior to the 4-month period, even though the interest was unrecorded or non-possessory until the creditor sought to perfect his right on the eve of bankruptcy. The tardy recordation or seizure of the collateral was said to "relate back" to the date of the original security agreement under state law as incorporated by reference in Section 60. See 286 F. Supp. at 603.

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5. See Kripke, "The Code and the Bankruptcy Act," 42 N. Y. U. L. Rev. 284, 289 (1967); Hogan, "Games Lawyers Play with the Bankruptcy Preference Challenge to Accounts and Inventory Financing," 53 Cornell L. Rev. 553, 557 (1968); Friedman, "The Bankruptcy Preference Challenge to After-Acquired Property Clauses Under the Code," 108 U. Pa. L. Rev. 194, 218 (1959); cf. *Rosenberg* v. *Rudnick*, 262 F. Supp. 635, 638 (D. Mass. 1967); *William Iselin & Co.* v. *Burgess & Leigh Ltd.*, 52 Misc. 821, 276 N. Y. S. 659 (Sup. Ct. 1967).

Under other presently immaterial provisions of the Code, the Bank's security interest would be subordinate to the rights of buyers in the ordinary course of business and persons holding perfected purchase money security interests. See §§ 9-307 (1) and 9-312 (3).

But the significance of these cases was not limited entirely to the evil of the secret lien. Even in cases where a security interest was duly recorded, if under state law taking possession of the collateral was required for perfection, as was the case for after-acquired accounts in so-called Massachusetts rule states, the courts relied on the doctrine of relation back to determine whether the trustee in bankruptcy could avoid security interests perfected just prior to bankruptcy. See *Thompson* v. *Fairbanks*, 196 U. S. 516. This suggests that the real basis for decision in these cases was not that state law provided no protection against secret liens but that even though creditors without knowledge could obtain a priority over the unperfected security interest by attaching the property prior to perfection, as a matter of federal law the trustee was not in the position of a prior attaching lien creditor. See, *e.g.*, *Sexton* v. *Kessler & Co.*, 225 U. S. 90, 97. The trustee's rights were said to attach as of the filing of the petition, and the doctrine of relation back was relied on for the proposition that as to one not standing in the position of an attaching lien creditor, the operative event was the creation of rights between the parties which took place before the 4-month period. See *Bailey* v. *Baker Ice Mach. Co.*, 239 U. S. 268, 275-276. The Act was not interpreted to specify the moment of perfection as the point at which a transfer took place.

That this was the problem Congress intended to remedy is supported by the fact that the revision of Section 60 in 1938 did not take the form of withdrawal of the reference to state law or the super-imposition of federal standards as to recordation or perfection. Instead the revisers merely delayed the effectiveness of a transfer to the point at which it became effective against bona fide purchasers[6] and cred-

6. The operative language of amended Section 60a provided that "* * * [a] transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any

itors under state law and placed the trustee in the position to exercise the rights of those parties under state law as to transfers taking place within the 4-month pre-filing period. See H. R. Rep. No. 1409, 75th Cong., 1st Sess. 30 (1937). There is nothing in the legislative history which suggests that Congress intended to cast doubt on the method of financing by means of a rotating stock of accounts receivable. Indeed, the 1950 legislative repeal of *Corn Exchange Nat'l Bank & Trust Co.* v. *Klauder*, 318 U. S. 434, suggests that Congress was aware of the importance of accounts receivable financing and approved its utility where the unsecured creditors of the bankrupt had record notice of the existence of such a financing agreement. In recommending the further amendment of Section 60 to restrict the bona fide purchaser test to real property transactions, the House Committee made the following observations:

> "The present language of the act tends to impede and choke the flow of credit, principally to small businessmen, and the object of the bill is to free its channels.
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> * * * * * * *
>
> "In 1938 the Bankruptcy Act was amended to obviate the effect of these cases,[7] which were regarded with disfavor by the great majority. But, in so doing the authors of the amendment went further than was necessary, and it brought about results which they did not anticipate. The amendment placed the trustee

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rights in the property so transferred superior to the rights of the transferee therein * * *." (52 Stat. 869.) The reference to bona fide purchasers as well as creditors may have resulted from an excess of caution induced by the opinion in *Carey* v. *Donohue*, 240 U. S. 430, involving real property. As recognized in the bifurcated test adopted in 1950 in the second sentence of 60a(2) (11 U. S. C. § 96(a) (2)), the reference to bona fide purchasers should have been, and now is, confined to real estate transactions.

7. *Sexton* v. *Kessler & Co.*, 225 U. S. 90; *Bailey* v. *Baker Ice Mach. Co.*, 239 U. S. 268; *Carey* v. *Donohue*, 240 U. S. 430; and *Martin* v. *Commercial National Bank*, 245 U. S. 513.

> in the position of an artificial bona fide purchaser, and by so doing, eventually invalidated many types of liens acquired in good faith and for value, in normal and accepted business and financial relationships." (2 U. S. Code Cong. Serv., 81st Cong., 2d Sess. 1985, 1986-1987 (1950).)

Our upholding of the practice followed here by the Bank against attack as a preference does not depend on any relation back of actions taken on the eve of bankruptcy in order to save a theretofore defeasible security interest from attack by the trustee. Rather, it relies on the relation forward of record notice prior to the 4-month pre-bankruptcy period as being sufficient to give the secured party a priority over subsequently attaching lien or judgment creditors, including the trustee. As the district court stated, these were "assets which the general creditors never had reasonably expected and could not expect to have available to satisfy their claims." 286 F. Supp. at p. 604. To hold otherwise would result in "a windfall to the general creditor who had long been on constructive notice that the debtors' future assets were to be made a part of the secured creditor's collateral"! Friedman, note 5 *supra,* at p. 221. Accordingly, it does not distort the Congressional purpose to conclude that the "so far perfected" language of Section 60a(2) of the Bankruptcy Act was satisfied at the time of the September 1965 filing of the financing statements.

The Transfer Was Not on Account of Antecedent Debt.

As an alternative holding, the district court reasoned that there was no voidable preference because there had been no transfer of Grain Merchants' property to the Bank "on account of an antecedent debt" within the meaning of Section 60a(1) of the Bankruptcy Act. The referee had reached the opposite conclusion by regarding the

Bank's security interest in the accounts receivable as a separate interest in individual accounts. Under his reasoning, the transfers of this property of Grain Merchants to the Bank occurred at the moment the individual accounts receivable came into existence. Since the accounts receivable in question arose after September 20, 1966, the last date that the Bank extended credit to Grain Merchants, the referee held that those accounts receivable were transferred to secure antecedent debt of Grain Merchants to the Bank.

The district court considered the post September 20, 1966 accounts receivable as part of the entire stock of the accounts receivable transferred when the Bank filed its financing statements, stating that "From a business standpoint, the most accurate view of the transaction is to regard the stock of accounts receivable together as a single entity which was given as security for a new loan" (286 F. Supp. at pp. 604-605). The entity theory was first advanced in *Manchester National Bank* v. *Roche*, 186 F. 2d 827 (1st Cir. 1951), by Judge Magruder. As he stated (at p. 831):

> "By analogy it might be possible to treat a merchant's accounts receivable as a unit presently and continuously in existence, the component elements of which (the particular accounts) may be constantly changing, without affecting the identity of the *res;* so that a general assignment by way of security of accounts receivable present and future might be deemed to create *in praesenti* a lien upon this enduring unit, the accounts receivable, which lien would persist as a floating charge upon such *res,* however much its component elements might change from time to time by the payment of old accounts and the creation of new ones."[8]

8. Because of the language of Section 5 of the New Hampshire Factor's Lien Act, Judge Magruder was unable to apply the entity concept in the *Manchester National Bank* case.

As has been observed elsewhere, "this is a simple, commonsense approach that has long been accepted, though not in name, by decisions and statutes." Henson, " 'Proceeds' Under the Uniform Commercial Code," 65 Colum. L. Rev. 232, 235-236 (1965). The concept has been depicted as a stream:

> "The secured creditors interest is in the stream of accounts flowing through the debtor's business, not in any specific accounts. As with the Heraclitean river, although the accounts in the stream constantly change, we can say it is the same stream." (Footnote omitted.) Hogan, note 5 *supra*, at p. 560.

The entity theory is consistent with the approach to revolving loans adopted in Section 9-204(3) of the Code permitting a security agreement to provide that collateral, whenever acquired, secure the obligations covered by the agreement. Under this approach, "Advances and collateral interact as a single organism," thus negating antecedent debt. Kohn, "Preferential Transfers on the Eve of the Bankruptcy Amendments," 2 Prospectus 259, 267 (1968).

We agree with the decisions below and in *In the Matter of Portland Newspaper Publishing Co., Inc.*, 271 F. Supp. 395 (D. Ore. 1967), pending on appeal, that the creditor's security interest was in the entity of the accounts receivable as a whole, and not in the individual components, so that the transfer of property occurred here when the interest in the accounts receivable as an entity was created and the financing statements were duly filed in September 1965.[9] This recognizes business realities, for the business community has depended upon a revolving or flow type of

9. After-acquired inventory subjected to a security interest has also been viewed as a single entity rather than a mere conglomeration of individual items each subject to a separate lien. *Rosenberg* v. *Rudwick*, 262 F. Supp. 635 (D. Mass. 1967); see *Matthews* v. *James Talcott, Inc.*, 345 F. 2d 374, 380 (7th Cir. 1965), certiorari denied, 382 U. S. 837.

accounts receivable financing for many years. As stated in the *Portland Newspaper* case, "Good business practice should be good business law" (271 F. Supp. at p. 400).

Accepting the entity theory here as to accounts receivable does not conflict with Section 60 of the Bankruptcy Act. Its purpose is to protect general creditors against those seeking unfair advantages during the four months before bankruptcy. The Bank is seeking merely to enforce a 1965 security agreement and not to press for any unfair advantage that occurred within four months of bankruptcy. As the court stated in *Rosenberg* v. *Rudnick*, 262 F. Supp. 635, 639 (D. Mass. 1967), about a comparable after-acquired inventory problem:

> "The statutory provisions for notice filing were fully complied with. No supplier who sold merchandise on credit to Boyle can justifiably claim he relied on the appearance of Boyle's inventory. He could easily have determined the extent of Rudnick's interest in it, and could have protected himself, if he so wished, either by perfecting a purchase money security interest under § 9-312(3), or, as some suppliers did, by getting Rudnick to guarantee payment."[10]

As pointed out in the *amicus* brief of the National Commercial Finance Conference, many lenders making loans secured by a revolving pool of collateral have dispensed with the assignment of individual receivables and the use of special cash collateral accounts for receiving and dispersing the proceeds therefrom. This flexible method of financing, with its minimum cost, is authorized by Section 9-205 of the Code, which abrogates the state law "debtor dominion" rule of *Benedict* v. *Ratner*, 268 U. S. 353, and would be jeopardized if financing institutions had to insist on individual assignment of after-arising accounts receivable. The trustee conceded at oral argument that if these

10. The instant case involves none of the possible abuses foreseen by Professor Hogan, note 5 *supra*, at p. 561.

somewhat archaic pre-Code procedures had been followed, with a new loan advanced for each account receivable, no attack under the preference Section of the Bankruptcy Act would have been possible. An objection of this nature which can be satisfied by the mere multiplication of unnecessary paper work which in itself contributes nothing to the protection of unsecured creditors does not persuade us that the method of accounts receivable financing employed here conflicts with anything in the Bankruptcy Act.

In holding that the post September 20, 1966, accounts receivable were part of an entity, it follows that they were transferred when the financing statements were filed in September, 1965. Since the transfer preceded the extensions of credit with which we are concerned here, such transfer could not have been made "for or on account of antecedent debt" under Section 60a(1) of the Bankruptcy Act.

The Substitution of Collateral Doctrine Negates Any Preference Here.

Under the Bankruptcy Act, it is well settled that a transfer by an insolvent debtor within four months of bankruptcy is not a "preference" where the transfer to the creditor is "for a substantially contemporary advance." *Dean* v. *Davis,* 242 U. S. 438, 443. If such a transfer does not deplete the estate, it is not made "on account of an antecedent debt," nor does it have the effect of enabling the creditor "to obtain a greater percentage of his debt than some other creditor of the same class" (Section 60a(1) of the Bankruptcy Act, 11 U. S. C. § 96(a)(1)). See 3 Collier on Bankruptcy ¶ 60.20 (14th ed. 1968).

Under the leading case of *In re Pusey, Maynes, Breish Co.,* 122 F. 2d 606 (3d Cir. 1941), through the substitution of collateral doctrine, a transfer of accounts receivable

to the secured creditor made during the four months prior to bankruptcy is not considered preferential where the accounts transferred are substituted for prior released accounts. See *In the Matter of Portland Newspaper Publishing Co., Inc.*, 271 F. Supp. 395, 401 (D. Ore. 1967).

Here, as existing accounts receivable were collected by Grain Merchants and deposited to its accounts at the Bank, the funds from previously collected accounts were made available to the debtor, enabling it to continue in business and obtain new accounts receivable. During the critical period from September 20 when the Bank last extended value until September 30 when Grain Merchants ceased doing business, the debtor's withdrawals appear generally to have been in line with the deposits from new accounts receivable. See Appendix to this opinion. Our study of this record shows that at the end of each of the four months preceding bankruptcy, there was an excess of collateral over secured debt, indicating that collateral was regularly transferred in substitution for other collateral without diminishing the bankruptcy assets available for creditors. Here the newly arising accounts receivable may be considered as having been taken in exchange for the release of rights in earlier accounts and for a present consideration. Since the relative positions of the Bank and the debtor were unaltered by the exchanges, the debtor's other creditors cannot be considered harmed by the transactions with the Bank. See Hogan, note 5 *supra*, at pp. 561-565.

As previously observed under Section 9-205 of the Commercial Code, it was unnecessary for the Bank to assume dominion over individual accounts receivable. Therefore, it is no longer appropriate to apply strict timing or value rules[11] so long as at all relevant times

11. The timing rule is that the new collateral must be transferred to the secured party either prior to or contemporaneously with the release of the old collateral. The value rule is that if the

the total pool of collateral, as here, exceeded the total debt. The trustee's purported distinction of *In re Pusey, Maynes, Breish Co.* on this ground is thus unpersuasive. In this connection, it is noteworthy that amendments have been proposed to Section 60 of the Bankruptcy Act by a committee of the National Bankruptcy Conference so that transfers of receivables, pursuant to a security agreement, within four months of bankruptcy will not constitute preferences if they arose in the ordinary course of the debtor's business. But under a proposed two-point test, there will be a preference to the extent that the aggregate value of the receivables subject to the security agreement on the date of filing the bankruptcy petition exceeds the aggregate value subject to the security agreement four months earlier. The preference is measured by reference to these two points of time regardless of the fluctuations of the collateral that might occur in the 4-month period. See Kohn, "Preferential Transfers on the Eve of the Bankruptcy Amendments," 2 Prospectus 259, 261 (1968). This two-point test does not require a detailed tracing of individual accounts receivable. Here the pool of accounts receivable was remarkably stead in aggregate value through the entire period of the security agreement (see Appendix), justifying the applicability of the substitution of collateral principle to these facts. Hence for this additional reason we conclude that there was no forbidden preference.

The trustee strongly contends that the conclusion that the transfers of accounts receivable to the Bank were not on account of antecedent debt cannot be sustained without the aid of Section 9-108 of the Code.[12] He reasons

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new collateral is a greater value than the collateral which is released, a voidable preference to the extent of the difference in value will result.

12. Section 9-108 provides:

"When after-acquired collateral not security for antecedent debt.—Where a secured party makes an advance, incurs an

that Section 9-108 must fall before the superior command of federal law as contained in Section 60a of the Bankruptcy Act.[13] We would be reluctant to hold that the Congressional reference to state law in Section 60a does not encompass the provisions of the Code, now adopted in 49 states and enacted by Congress for the District of Columbia and which has been recognized to be a valuable source for determining federal commercial law (*United States* v. *Wegematic Corp.*, 360 F. 2d 674, 676 (2d Cir. 1966); *United States* v. *National Optical Stores*, ... F. 2d ..... (7th Cir. 1969)). However, there is no need to resolve any asserted conflict, for Section 9-108 is unnecessary to the result reached here. That Section merely attempts to codify as state law the substitution of collateral doctrine, which is implicit in the provisions of the Bankruptcy Act, with the additional safeguard that such substitution arises in the ordinary course of business.[14]

The Permanent Editorial Board for the Uniform Commercial Code asserts that the accounts billed after Sep-

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obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given."

13. He thus aligns himself with proponents of what might well be called the "conspiracy theory" of the drafting of Section 9-108. See, *e.g.*, Reimer, "Conflict Between Section 9-108 of the Uniform Commercial Code and Section 60(a) of the Bankruptcy Act," 70 Comm'l L. J. 63 (1965); Gordon, "The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem," 62 Colum. L. Rev. 49 (1962).

14. *Cf.* Henson, "The *Portland* Case," 1 Ga. L. Rev. 257, 261-263 (1967).

tember 20, 1966, were proceeds of inventory owned by Grain Merchants on that date, and in which the Bank therefore held a non-preferential security interest. From this, it is argued that the Bank's security interest in the proceeds of that collateral was also non-preferential. Since this point was not presented in the district court, it will not be considered here. See *Manchester National Bank* v. *Roche*, 186 F. 2d 827, 829, note 3 (1st Cir. 1951).

For the foregoing reasons, the judgment is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix.

Grain Merchants' Deposits and the Balance of its Accounts at Union Bank at the End of Each Day Shown.

Date in 1966	Amount Deposited	Account Balance
September 20		$17,518.68
21	$ 4,691.88	17,685.72
22	8,702.65	22,006.80
23	9,548.49	29,145.64
26	7,530.01	23,127.26
27	4,270.77	20,770.01
28	3,486.75	16,304.58
29	6,247.63	16,806.03
30	3,564.80	18,985.45
	$48,042.98	

Total debt of Grain Merchants to Union Bank between January, 1966 and September, 1966, compared to accounts receivable of Grain Merchants.

1966	Total Debt	Accounts Receivable
January	$162,000.00	$176,483.21
February	162,000.00	191,439.52
March	162,000.00	177,343.26
April	160,000.00	183,021.65
May	160,000.00	172,192.84
June	156,850.00	172,816.20
July	155,000.00	169,629.81
August	150,000.00	185,292.43
September	150,000.00	176,841.77

APPENDIX D.

CONSTITUTIONAL PROVISION, PORTIONS OF THE BANKRUPTCY ACT AND PORTIONS OF THE UNIFORM COMMERCIAL CODE INVOLVED.

CONSTITUTION:

Article I, Section 8 (4) provides in pertinent part as follows:

> "The Congress shall have the power . . . to establish . . . uniform laws on the subject of bankruptcy throughout the United States. . . ."

BANKRUPTCY ACT:

Section 60 (11 U. S. C. Sec. 96)—

Preferred Creditors.

"a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

"(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. . . ."

"b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto

has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *provided, however,* that where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Section 70 (11 U. S. C. Sec. 110)

Title to Property

"c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon

which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction. . . .

"e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable of any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: *Provided, however*, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws."

INDIANA UNIFORM COMMERCIAL CODE:

Section 19-9-204.

When security interest attaches—After-acquired property—Future advances.

"(1) A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

"(2) For purposes of this section the debtor has no rights . . .

(d) in an account until it comes into existence.

"(3) Except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement. . . ."

Section 19-9-301.

Persons who take priority over unperfected security interest—"Lien Creditor."

"(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . .

(d) in the case of accounts, contract rights, and general intangibles, a person who is not a secure party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected."

Section 19-9-303.

When security interest is perfected—Continuity of perfection.—

"(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections [19-] 9-302, [19-] 9-304, [19-] 9-305, and [19-] 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

JUL 7
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 213

MARK L. FRANCE, TRUSTEE,
Petitioner,

vs.

UNION BANK AND SAVINGS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1498.

MARK L. FRANCE, TRUSTEE,

Petitioner,

vs.

UNION BANK AND SAVINGS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

OPINIONS BELOW.

The statement as contained in the Petition for Writ of Certiorari regarding the opinions below is substantially correct but somewhat inexact in certain details. Since these are of secondary importance for purposes of a Petition for Writ of Certiorari, but nevertheless should not go unnoticed, the corrections are set out in Appendix A hereto.

JURISDICTION.

Respondent has no disagreement with Petitioner's statement of jurisdiction.

QUESTIONS PRESENTED.

The actual amount in controversy, on appeal, was and is $45,324.97, not $52,441.49. (See Petitioner's Appendix 43 A and Respondent's Appendix C.)

The questions here presented for review may be more accurately stated as follows:

Where, a year before declaring bankruptcy, a debtor grants to a secured party a UCC security interest in its stock of present and future accounts receivable, notice of which is duly filed, does the security interest in those receivables (the amount thereof being $45,324.97) which arose after the date of the last outstanding Promissory Note given for value (September 20, 1966) by the debtor to the secured party, and within four months prior to the adjudication of bankruptcy of the debtor, constitute a Section 60 bankruptcy voidable preference?

Subordinate issues are:

(a) When were those items of the stock of accounts receivable, which items arose after September 20, 1966, transferred to Union Bank as the term "transfer" is defined under Section 60 (a) (2) of the Bankruptcy Act (11 U. S. C. Sec. 96a. (2)), i.e., "so far perfected" that no subsequent contract judgment lien creditor could become prior in right to Union Bank?

(b) Whether such receivables are to be deemed transferred on account of an antecedent debt?

(c) Where Bank permits Debtor to collect and use the proceeds of accounts receivable in which receivables the Bank has a valid and sufficiently perfected security interest prior to and during the entire four month pre-bankruptcy period, and until the date on which said debtor ceases to do business, and such accounts receivable outstanding at the beginning of such period are roughly in the same

amount as the accounts receivable outstanding at the time the debtor ceases doing business, is the release of the proceeds of existing accounts receivable and the creation of new accounts such a substitution of collateral that the interest of the Bank in the new accounts cannot be preferential under Section 60 of the Bankruptcy Act?

(d) What impact, if any, does Burns' Ind. Stat., Sec. 19-9-108 (hereinafter referred to as UCC Section 9-108) have on the determination of whether or not a preferential transfer under Section 60 of the Bankruptcy Act occurred?

CONSTITUTIONAL PROVISION, PORTIONS OF THE BANKRUPTCY ACT AND PORTIONS OF THE UNIFORM COMMERCIAL CODE INVOLVED.

Petitioner has failed to set out certain particular pertinent portions of the Uniform Commercial Code, to wit: Sections 9-108, 9-205 and 9-301 (3). These and other sections of the Uniform Commercial Code appropriate to this case, together with Section 60 of the Bankruptcy Act, are set forth in Appendix B, *infra*, for convenient reference.

STATEMENT OF THE CASE.

We agree substantially with Petitioner's Statement of the Case; but certain details thereof are incorrect and certain omissions therein may be misleading. The correct facts are outlined in chart form set out in Appendix C hereto.

Petitioner's statement that the basis of the decision of the Court of Appeals was that the bank possessed a security interest in future accounts receivable that was so far perfected that the Trustee in Bankruptcy, "*despite* the power conferred upon him by the Bankruptcy Act", acquired no rights in the accounts receivable claimed by him, is misleading. The decision of the Court of Appeals in favor of Union Bank is clearly based upon the precise language

of the Bankruptcy Act and not at all contrary to or in conflict with the powers the Act confers upon a Trustee in Bankruptcy. The elements of the Court of Appeals decision in this regard are outlined in greater detail in Appendix D.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

The decisions below by the District Court and by the Court of Appeals are clearly correct.

Petitioner has wholly failed to demonstrate the existence of any substantial federal question which requires determination by this court.

By citing the running debate which has been carried on within the academic community of the legal world for the past nine or ten years, Petitioner attempts to lend substance to his claim of a purported conflict between Section 9-108 of the Uniform Commercial Code and Section 60 of the Bankruptcy Act, and to his further claim that the decisions below amount to a judicial amendment of Section 60 of the Bankruptcy Act by reading Section 9-108 of the Uniform Commercial Code into it.

There is no conflict, however, among the courts that have dealt with the issue here involved. All the decisions agree, not only as to the rule of law but also as to the basis for arriving at it.

There are now four Federal District Court decisions and one Court of Appeals decision on the subject, all of which have held in essence that the revolving body of a debtor's accounts receivable or inventory are an entity to be treated as such without regard to the exact date on which a particular account or item of inventory making up the entity arose, or was acquired. The courts have likewise held that such treatment accords with the established, sound, busi-

ness, commercial and banking practice as well as with the intent and clear meaning of Section 60 of the Bankruptcy Act. These cases are:

Rosenberg v. *Rudnick* (1967), 262 F. Supp. 635 (D. C., Mass.);

In Re White (1967), 283 F. Supp. 208 (D. C., Ohio);

In Re Portland Newspaper Publishing Company, Inc. (1967), 271 F. Supp. 395 (D. C., Ore.);

Grain Merchants of Indiana, Inc., et al., Bankrupts, Mark L. France, Trustee v. *Union Bank and Savings Company Bellevue, Ohio* (1968), 286 F. Supp. 596 (D. C., Ind.);

Grain Merchants of Indiana, Inc., et al., Bankrupts, Mark L. France, Trustee v. *Union Bank and Savings Company, Bellevue, Ohio* (1969), 408 F. 2d 209 (C. A. 7).

Respondent is aware that the decision in the Oregon District Court (*In Re Portland Newspaper Publishing Company, Inc., supra*) is presently pending on appeal in the United States Court of Appeals for the Ninth Circuit. There is no conflict in the courts at the present time, however, and Respondent anticipates no conflicting decision because of the clarity of the precedent on the issue, not only in the cases above cited but also in those which fathered them.

The pre-Code ancestry of these decisions is to be found in the following older and important cases:

In Re Pusey, Maynes, Breish Company (1941), 122 F. 2d 606 (C. A. 3). In this case, Judge Goodrich defined the substitution of collateral approach to the nature of later arising receivables replacing those the proceeds of which were used in the business of the borrower.

Rockmore v. *Lehman* (1942), 129 F. 2d 892 (C. A. 2), Cert. den. 317 U. S. 700. In Rockmore, Judge Augustus

Hand held that the date of the assignment of a contract controlled, for purposes of the then version of Section 60 of the Bankruptcy Act, rather than the date when the proceeds of the contract came into existence thereafter.

Manchester National Bank v. *Roche* (1951), 186 F. 2d 827 (C. A. 1). Here Judge Magruder first stated the entity or *res* concept of the commercial nature of a debtor's inventory and accounts receivable.

Mathews v. *James Talcott Inc.* (1965), 345 F. 2d 374 (C. A. 7) Cert. den. 382 U. S. 837. In this case Judge Swygart held that a pre-Code factor's lien applied to all items of inventory without regard to how frequently designations were made as the company sold or added items to its inventory and that it was the date the factor's lien notice was filed that controlled not the dates when inventory designations occurred.

The purported conflict between Bankruptcy Act 60 and Uniform Commercial Code § 9-108 is no more than a straw man set up for the convenient purpose of easily shooting it down. Judge Eschbach, in the District Court below, made his decision without the aid of Section 9-108 but pointed out that he found that section in no way inconsistent with a rational interpretation of Section 60 of the Bankruptcy Act and with its legislative history. Judge Cummings, speaking for the unanimous Court in the Seventh Circuit below, stated that Section 9-108 merely codifies as state law the substitution of collateral doctrine first asserted in *In Re Pusey, Maynes, Breish Company, Inc., supra,* but in any event the section is unnecessary to the decision in this case.

The proponents of this purported conflict (including Petitioner) are uniformly careless with the term "perfected" as it appears in Section 60 of the Bankruptcy Act and various places in the Uniform Commercial Code.

Here, whatever use the Uniform Commercial Code may make of the term in various contexts, we are concerned only with its use in Section 60 of the Bankruptcy Act. There the phrase is "so far perfected" as to cut off a simple judgment lien creditor. This is quite different from the full perfection envisioned by the Uniform Commercial Code which requires *attachment* (9-303 (1)) and *existence* (9-204 (2)).

Ironically, Petitioner, on the one hand asserts conflict between Section 9-108 of the Uniform Commercial Code and Section 60 of the Bankruptcy Act. Finding such purported conflict, Petitioner asserts the obvious supremacy of the Bankruptcy Act.

On the other hand, Petitioner while constantly ignoring the clearly enunciated bankruptcy standard of "so far perfected" that no subsequent judgment lien creditor could gain priority, nevertheless insists on imposing on the court the state standard of *full* perfection as set out in Sections 9-204 (1) and (2) and 9-303 (1) of the Uniform Commercial Code.

Since the Bankruptcy Act contains a complete definition of the perfection necessary to a non-preferential transfer, the attempt to resort to a state law definition of perfection is futile and inappropriate.

Basically a very simple proposition is involved here. Where the Bank's interest in the debtor's accounts receivable, which arose after the last date new value was given and during the four months pre-bankruptcy period is "so far perfected" prior to that time that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior (Bankruptcy Act § 60), the transfer of the bankrupt's property occurred prior to the pre-bankruptcy four months period and was not for an antecedent debt. Consequently, one of

the seven requirements for a forbidden preference, as provided in Section 60 of the Bankruptcy Act, is missing and no perference exists. Thus the issue is determined simply by applying the Bankruptcy Act. In order to find when such limited degree of perfection takes place, the courts have always looked to state law—in this case, the Uniform Commercial Code. *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945). The specific sections of the Code to which the courts now look are 9-204 (3) and 9-301 (1)(d). The effect of these provisions is that no subsequent judgment creditor could obtain a lien superior to that of the Bank's security interest.

In addition, when the bank creditor permitted the debtor to withdraw the proceeds of collected accounts receivable generally at about the same rate as new accounts were created, the transfer to the bank of new accounts would be in substitution for those so withdrawn and would not deplete the estate of the debtor. This substitution of accounts meant that the Bank did not "obtain a greater percentage of its debt than some other creditors of the same class" (Bankruptcy Act, Section 60(a)(1)). Therefore a second element of preference was not proven. Hence again one of the elements necessary to create a § 60 forbidden preference is missing.

On both these aspects of the case the courts below concluded in favor of the Bank and against the Trustee. A finding against the Trustee on either point requires a decision against him because they are two of the seven essential elements the existence of which Section 60 of the Bankruptcy Act requires in order to establish a forbidden preferential transfer.

At page 10 of his Brief, Petitioner urges that Sections 70(c) (1) and (2) of the Bankruptcy Act, alone, place the Trustee in a position of superiority over the Bank as to all

the accounts receivable arising after September 20, 1966. Section 70(e) depends on Section 70(c) which in turn is operable only as of the date of bankruptcy, not four months prior thereto. In this case the Bankrupt terminated business on September 30, 1966 and petitioned for bankruptcy on October 27, 1966. Obviously, therefore, all accounts receivable in issue were in actual existence prior to the bankruptcy date and consequently, even in terms of Petitioner's own argument, the Bank's interest was fully perfected almost a month before the Trustee acquired any Section 70(c) rights.

Petitioner attempts, also, through his analogy to the old choate lien test under the pre-1966 Tax Lien Act to again assert a full perfection test for the transfer required by Section 60 of the Bankruptcy Act to avoid illegal preferences. As previously noted, Section 60 provides for a less than full Code perfection in determining when a transfer occurs for bankruptcy preference purposes. It should also be noted that Section 6323 of the 1966 Tax Lien Act ameliorates the choate lien test in UCC situations.

The legislative history of Section 60 of the Bankruptcy Act is thoroughly dealt with by both Judge Eschbach in the District Court decision and Judge Cummings in the Court of Appeals ruling below. From their comments on the subject, it is clear that the amendments of this section in 1903, 1910, 1926, 1938 and 1950 show a present legislative intent to permit business financing through a creditor's lien on a rotating stock of accounts receivable, subject only to certain mechanical steps required of the creditor which are not in issue here.

The lack of any substance to the question raised by Petitioner is additionally evidenced, as pointed out by the

Court of Appeals, by the current proposals of the National Bankruptcy Conference to further amend Section 60 to specifically reflect in its language the now well-accepted substitution of collateral doctrine, provided only that the security interest created by the security agreement may not apply to an aggregate of accounts receivable on the date of the bankruptcy petition greater than the aggregate of accounts receivable existing four months prior to bankruptcy. From the Court of Appeals Appendix it is clear that even under this rule there would be no forbidden preference in this case. Cf. *In re Hygrade Envelope Corp.*, 393 F. 2d 60 (C. A. 2, 1968).

The parties to this matter followed common commercial and business practice and the precedent established in the cases cited by Respondent herein, treating the borrower's accounts receivable as an entity or stock. Only the total of its accounts receivable was involved in the amount Grain Merchants could borrow. Any reference to a particular receivable, whether in terms of time or source, was in no way in the minds of the parties.

CONCLUSION

Clearly, there is no substantial federal question in need of settlement by this court.

The decision below in the Court of Appeals [and in the District Court] is correct. It conforms to long settled federal precedent which has never been seriously challenged by any court. It agrees fully with the only other (three District Court) opinions directly in point on the subject. There is no conflict among any of the courts below. There is no actual statutory conflict requiring further judicial attention. All the courts which have dealt with the subject found that

UCC § 9-108 either was not necessary to its decision or merely accorded with the proper interpretation and application of § 60 of the Bankruptcy Act, or both.

In consquence certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Corrected Statement Regarding the Opinions Below.

1. Of the amount of $52,441.49 ordered by the Referee in Bankruptcy turned over by Union Bank and Savings Company to Mark L. France, Trustee, $7,116.52 was held by the bank in escrow for the benefit of the Trustee under agreement entered into between the Bank and the Trustee in open court. The actual amount in controversy after the entry of the Referee's order was therefore not $52,441.49 but was $45,324.97. This order was based on the Referee's conclusion that the transfer of these post-September 20, 1966 accounts receivable was preferential.

2. The United States District Court for the Northern District of Indiana set aside the Referee's order and held that no preferential transfer of accounts receivable occurred as to the principal amount owed to the Bank, together with interest. The matter was remanded to the Referee only for further proceedings on the secondary question of whether proceeds of accounts receivable could be also applied to satisfy two other notes which were otherwise collateralized by warehouse receipts on certain grain storage.

APPENDIX B.

Statutes Involved.

A. Bankruptcy Act.

Section 60a(1), (2) (11 U. S. C. Sec. 96a (1), (2)):

Sec. 60. Preferred Creditors. a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purpose of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee . . . (I)f any transfer . . . is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

Section 60b (11 U. S. C. Sec. 96b):

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent . . .

Section 1(30) (11 U. S. C. Sec. 1(30)):

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

B. Uniform Commercial Code (Indiana).

Section 9-105 (Burns 19-9-105):

19-9-105. *Definitions and index of definitions.*—(1) In this Article unless the context otherwise requires: * * *

(c) "Collateral" means the property subject to a security interest, and includes accounts, contract rights, and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights, or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires: * * *

Section 9-106 (Burns 19-9-106):

19-9-106. *Definitions—"Account"—"Contract right"—"General intangibles."*—"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.

"Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper.

"General intangibles" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments.

Section 9-108 (Burns 19-9-108):

19-9-108. *When after-acquired collateral not security for antecedent debt.*—Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

Section 9-201 (Burns 19-9-201):

19-9-201. *General validity of security agreement.*—Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.

Section 9-203(1) (Burns 19-9-203(1)):

19-9-203(1). *Enforceability of security interest—Proceeds, formal requisites.*—(1) . . . a security interest is not enforceable against the debtor or third parties unless

(a) The collateral is in the possession of the secured party; or

(b) The debtor has signed a security agreement which contains a description of the collateral . . . In describing

collateral, the word "proceed" is sufficient without further description to cover proceeds of any character. * * *

Section 9-204 (Burns 19-9-204):

19-9-204. *When Security interest attaches.—After-acquired property.—Future advances.*—(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purpose of this section the debtor has no rights . . . (c) In a contract right until the contract has been made; (d) in an account until it comes into existence.

(3) . . . a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement . . .

Section 9-205 (Burns 19-9-205):

19-9-205. *Use or disposition of collateral without accounting permissible.*—A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contract rights, or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

Section 9-301 (Burns 19-9-301):

19-9-301. *Persons who take priority over unperfected security interest.—"Lien creditor."*—(1) Except as other-

wise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under section 19-9-312;

(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within ten (10) days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without

knowledge even though he personally has knowledge of the security interest.

Section 9-303(1) (Burns 19-9-303(1)):

19-9-303(1). *When security interest is perfected.—Continuity of perfection.*—(1) A security interest is perfected when it has attached and when all the applicable steps required for perfection have been taken . . . If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

Section 9-306 (Burns 19-9-306):

19-9-306. *"Proceeds."—Secured party's rights on disposition of collateral.*—(1) "Proceeds" includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are "cash proceeds." All other proceeds are "Non-cash proceeds."

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covering the original collateral also covers proceeds; or

(b) the security interest in the proceeds is perfected before the expiration of the 10-day period.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) in identifiable non-cash proceeds;

(b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is

(i) subject to any right of setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the 10-day period. * * *

APPENDIX C.

Chart Showing Correct Facts of the Case.

Trustee's Original Turnover Petition (Petitioner's App. p. 2A)

Account offset 10-3-66	$ 46,995.22
August, '66 accounts receivable	37,727.01
September, '66 accounts receivable	98,049.95
Total	$182,772.18

Actual Collections by Bank (Petitioner's App. p. 28A)

Sources other than receivables	$ 31,730.64
Receivables existing on or before 9-20-66	75,199.94
Receivables existing after 9-20-66	52,441.49
Total	$159,372.07

Debt due Bank (incl. interest) (Petitioner's App. p. 28A)

December 1965 Notes	$ 51,059.52
September 20, 1966 Note	100,596.03
Total	$152,255.55

Referee's Turnover Order

Bank keeps:

Sources other than receivables		
Bank offset	$17,928.49	
Grain Sales	13,802.15	
	$31,730.64	
Pre 9-20-66 Receivables	75,199.94	
Total		$106,930.58

(This amount not contested by Trustee.)

Remit to Trustee:

Post 9-20-66 receivables	$ 52,441.49
Less amount in escrow	— 7,116.62
Balance in controversy	$ 45,324.97

District Court's Order (Petitioner's App. p. 39A)
(On Petition for Review by Union Bank.)

Bank keeps:	
Pre 9-20-66 receivables ordered by Referee	$ 75,199.94
Additional receivables up to total of 9-20-66 Note	25,396.09
Total	$100,596.03
Sources other than receivables	31,730.64
Total	$132,326.67
Remanded on Question of additional collateral for December, 1965 Notes	$ 19,928.88

Court of Appeals Order (Petitioner's App. p. 58A)
(On Appeal by Trustee.)
Order of U. S. District Court affirmed.

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*Note: Includes $7,116.62 held in escrow for the Account of Trustee as per stipulation in open court.

COMMENT.

As indicated by the foregoing, in addition to the $100,000.00 note to which Petitioner refers in his Statement of the Case, there were two notes in the amount of $20,000.00 and $30,000.00 respectively, upon which interest had accrued in the amount of $1,059.50. Union Bank applied to the payment of these notes, from the accounts receivable it collected, the amount of $19,928.88 previously referred to. This amount is a part of the total amount of $45,324.97 which is in controversy here since, unless it may be retained by Union Bank under the decisions of the United States District Court and of the Court of Appeals for the Seventh Circuit, the question of whether it constitutes additional collateral for the two smaller notes is academic.

APPENDIX D.

Outline of Bases of Court of Appeals Decision Below.

1. By promptly filing financing statements in accordance with the Uniform Commercial Code, the Bank's security interest in future accounts receivable became superior to subsequent liens obtainable by "proceedings on a simple contract" as per Section 60a (2) of the Bankruptcy Act. (See Petitioner's Appendix p. 47 A.)

2. The prior record notice, which the financing statements constituted, relates forward to the four month pre-bankruptcy period sufficient to give the secured party priority over subsequently attaching judgment creditor's liens, including those of a bankruptcy trustee. (See Petitioner's Appendix p. 50 A.)

3. No transfer "on account of an antecedent debt" occurred because in actual business and banking practice receivables are treated as a single entity. (See Petitioner's Appendix p. 51 A.)

(Note: The District Court called them a "stock of accounts receivable"—see Petitioner's Appendix p. 33 A, and both courts found this consistent with Section 60 of the Bankruptcy Act.)

4. No transfer "on account of an antecedent debt", or one having the effect of enabling the creditor "to obtain a greater percentage of his debt than some other creditor of the same class", occurred because of the application of the Bank's lien to the post September 20, 1966 accounts receivable. Since such application did not deplete the bankrupt's estate available to general creditors, (i.e., the newly arising accounts receivable merely replaced prior

collateral being released to the debtor and the relative position of the bank to the debtor, and hence to the debtor's general creditors, did not alter) no harm resulted to him or them. (See Petitioner's App. p. 5 A.)

5. Section 9-108 of the Uniform Commercial Code is not necessary to the decision in favor of the Bank, but it is not in conflict with Section 60 of the Bankruptcy Act, properly interpreted and applied, but rather is merely a codification of the substitution of collateral doctrine implicit in the Bankruptcy Act. (See Petitioner's App. p. 57 A.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 213

(No. 1498 October Term, 1968)

MARK L. FRANCE, Trustee,
Petitioner,

vs.

UNION BANK AND SAVINGS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION.

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AUTHORITY TO FILE

Respondent files this Supplemental Brief pursuant to the provisions of Rule 24 (5), U. S. Supreme Court Rules.

SUPPLEMENTAL AUTHORITY

On page 5 of its Brief in Opposition respondent has cited *In re: Portland Newspaper Publishing Company, Inc.*, (1967) 271 F. Supp. 395 (D.C., Ore.). That case, as of the time of the filing of Respondent's brief was on appeal to the United States Court of Appeals for the Ninth Circuit.

Subsequently, the Ninth Circuit Court of Appeals issued its decision affirming the District Court without reservation.

> **Everette H. Williams v Rose City Development Co., Inc.*, (Aug. 20, 1969 No. 22507-A, United States Court of Appeals for the Ninth Circuit (Opinion not yet published).

The Oregon District Court previously had ruled on three claims sustaining one (Rose City Development Co., Inc.) and disallowing the other two.

*The revision in title of the case results from the fact that Portland Newspaper Publishing Company, Inc. was the bankrupt, and Everette H. Williams was the Trustee in Bankruptcy.

The claimants whose claims had been denied appealed. Concurrently the Trustee appealed the decision against him and in favor of Rose City. All three claims, as below, were dealt with by the Appellate Court in Consolidation.

The Rose City claim is the only one pertinent here. In that claim, both the District Court and the Court of Appeals for the Ninth Circuit held that a security interest in accounts receivable arising after the beginning of the four months immediately prior to bankruptcy is valid against the Trustee where a security agreement covering after-acquired accounts existed and proper notice had been filed more than four months prior to bankruptcy. Both decisions hold that in such instance the "transfer" took place more than four months prior to bankruptcy, i.e. at the time the security agreement was executed and notice filed. Consequently the transfer was not for or on account of an antecedent debt. Hence, no illegal bankruptcy preference resulted.

The Ninth Circuit Court rejected the assertions by the Trustee in Bankruptcy that under § 60 of the Bankruptcy Act there can be no security interest in an account receivable until that account receivable actually exists. Citing the decision of the Seventh Circuit in the case here below, the Court of Appeals

said:

> "Congress did not state that a 'transfer' occurs when a security interest attaches or when state law says a conveyance has been made. Congress provided that a transfer is 'deemed' to have been made when it became 'so far perfected' that no subsequent lien creditor could achieve priority. 'Transfer' for the purpose of section 60a(2) is thus equated with the act by which priority over later creditors is achieved and not with the event which attaches the security interest to a specific account."

> "We look to state law, therefore, only to decide the point at which Rose City's claim to the future accounts was sufficiently asserted to prevent a subsequent lien creditor from achieving priority over it in these accounts. That time was the date which Rose City filed its financing statement. *(Grain Merchants of Indiana Inc. v. Union Bank and Savings Co., Bellevue, Ohio* (7th Cir. 1969) 408 F. 2d

209). Because Rose City filed its financing statement long before the four month period anteceding bankruptcy, its security interest is immune from the Trustee's preference challenge."

Finally, the Court went on to say:

"Rose City's floating lien on accounts receivable was easily ascertainable by any creditor who cared to look at the financing statement. After the financing statement was filed, no creditor could reasonably have been misled into believing that Rose City's receivables would provide assets to which he could look to satisfy debts incurred for subsequent extensions of credit. Neither the Bankrupt or Rose City took any affirmative action to obtain for Rose City a favored position over other creditors of its class during the four months before bankruptcy."

"Nothing in the legislative history of section 60a(2)

> suggests that Congress intended to permit a trustee to upset floating liens on accounts receivable which, as here, were automatically perfected and which involved none of the symptoms of last minute favoritism characterizing true perferences. On the contrary, the history of the section shows that Congress knew how important accounts receivable financing was to the business community, particularly to small-business men, and one of Congress' principal objectives in amending section 60a(2) was to loosen the flow of credit to small-business men whose financing had been seriously impaired by the old bona fide purchaser test."

Thus, all of the six court decisions now on record on the central issue in this case (four District Courts and two Courts of Appeals) are in complete accord as to the validity of the creditor's argument and the lack of validity of the argument of the Trustee in Bankruptcy.

Hence it is now even more clear that there exists no substantial Federal question in need of settlement by this

Court. In fact there exists no question at all. All judicial authorities and precedents are in full agreement and in accord with the ruling of the Seventh Circuit below in this case.

Respectfully submitted,

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